SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, DATED DECEMBER 24, 1921, BY AND BETWEEN CONRAD HENRY MATTHIESSEN AND SAID THE NEW YORK TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	4	2
Exhibit A—Notice of deficiency, March 12, 1927	9	4
Exhibit B—Indenture dated December 24, 1921	11	5
Answer	16	8
Amended answer	18	9
Statement of evidence	22	11
Appearances	22	11
Petitioner's opening statement	23	11
Respondent's opening statement	26	1a
Motion to amend petition	26	13
Offers in evidence	32	16
Stipulations as to certain facts	33	17
Offers in evidence	35	18
Stipulation as to conference concerning tax	46	24
Petitioner's exhibit no. 3—Income tax return for calendar year 1922	48	25
Respondent's exhibit A—Revenue agent's report, May 22, 1926	52	25
Findings of fact and opinion, McMahon, M	59	29
Decision	68	34
Petition for review	69	35
Notice of filing petition for review	75	37
Praecipe for record	77	38
Clerk's certificate [omitted in printing]	79	38
Proceedings in U.S.C.C.A., Second Circuit	80	39
Opinion, Hand, J	80	39
Dissenting opinion, Manton, J	82	41
Judgment	83	43
Clerk's certificate [omitted in printing]	85	43
Orders allowing certiorari	45, 46	45

1 Before United States Board of Tax Appeals

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Entries.

Appearances:
For Taxpayer: Russell D. Morrill, Esq., Henry Mannix, Esq.
For Comm'r.: Brooks Fullerton, Esq., J. F. Greaney, Esq., Stanley Suydam, Esq.

1927

May 9—Petition received and filed. Taxpayer notified.
" 10—Copy of petition served on general counsel.
July 8—Answer filed by general counsel.
" 11—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 14—Hearing set November 26, 1929.
Nov. 2—Notice of change of hearing to December 9, 1929.
Dec. 7—Amended answer filed by general counsel. December 9, 1929 copy served on taxpayer.
2 Dec. 9—Hearing had before Mr. McMahon. Submitted. Ordered amendment to petition granted and dictated into record also amendment to answer granted and dictated into record. Stipulations dictated into record. Briefs due January 5, 1930.
Dec. 30—Transcript of hearing of December 9, 1929, filed.

1930

Jan. 4—Brief filed by taxpayer.
" 4—Motion for extension to January 15, 1930, to file brief filed by general counsel. January 4, 1930, granted.
" 13—Brief filed by general counsel.
June 26—Findings of fact and opinion rendered, Stephen J. McMahon, division 16. Proceeding will be dismissed for lack of jurisdiction.
" 30—Decision entered, Logan Morris, division 14.
Dec. 20—Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by general counsel.
" 27—Proof of service filed. (G. B. Paull.)
" 27—Proof of service filed. (White & Case.)

1931

Jan. 27—Motion for extension to March 1, 1931, to complete and transmit record filed by general counsel.

Jan. 30—Order enlarging time to March 2, 1931, for preparation of evidence and delivery of record entered.

3 Feb. 24—Praecipe filed by general counsel.

" 27—Motion for extension to March 20, 1931, to complete and transmit record filed by general counsel.

Mar. 2—Proof of service of praecipe filed. (White & Case.)

" 2—Proof of service of praecipe filed. (New York Trust Co.)

" 2—Order enlarging time to March 20, 1931, for transmission and delivery of record entered.

" 20—Order enlarging time to April 30, 1931, for transmission and delivery of record entered.

Apr. 22—Order enlarging time to May 30, 1931, for transmission and delivery of record entered.

May 16—Transcript of record sur petition for review sent clerk of the United States Circuit Court of Appeals in New York City.

Dec. 24—Mandate from United States Circuit Court of Appeals (2) reversing Board's decision filed.

1932

May 3—Stipulation of facts and briefs to be filed before September 15, 1932, filed. Approved.

Sept. 14—Motion for extension to September 26, 1932, to file brief filed by general counsel. September 14, 1932, granted to September 26, 1932.

" 15—Brief filed by taxpayer.

" 26—Brief filed by general counsel.

4 1933

Apr. 10—Findings of fact and opinion rendered, Stephen J. McMahon, division 16. Decision will be entered for the respondent.

" 11—Decision entered, Stephen J. McMahon, division 16.

June 28—Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

July 1—Proof of service filed by taxpayer.

June 29—Praecipe for record filed by taxpayer.

July 1—Proof of service filed.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed May 9, 1927

The above-named petitioner hereby petitions for a redeter-
5 mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: PA: 3-60D-JHJ, dated March 12, 1927, and as a basis of its proceedings alleges as follows:

1. The petitioner is a corporation duly organized under the banking law of the State of New York, with its principal office at no. 100 Broadway, New York City.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1927.

3. The taxes in controversy are income taxes for the calender year 1922 and in the sum of $238,275.96.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent has erroneously determined petitioner's gross income for the year 1922 in that he has incorrectly computed the profit realized in that year upon the sale of 6,000 shares of the common stock of Corn Products Refining Company, such profit having been computed by using as a basis the cost of said stock to petitioner's grantor pursuant to the provisions of section 202 (a) (2) of the revenue act of 1921, instead of its fair market value on the date it was acquired by petitioner.

(b) Insofar as section 202 (a) (2) of the revenue act of
6 1921 purports to authorize respondent to tax to petitioner an alleged profit upon the sale of the stock referred to in the preceding paragraph, computed by using as a basis the cost of said stock to petitioner's grantor, said section is unconstitutional and void.

(c) In the event the board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit referred to in the preceding paragraph was correct, then respondent erred in computing the tax upon said profit at the full nominal and surtax rates instead of at the rate of 12½% in accordance with section 206 of the Revenue Act of 1921.

5 The facts upon which the petitioner relies as the basis for this proceeding are as follows:

(a) The petitioner is a corporation organized under the banking law of the State of New York, with its principal office at 100 Broadway, New York City.

(b) By an irrevocable indenture, dated December 24, 1921, Conrad Henry Matthiessen transferred six thousand (6,000) shares of the common stock of Corn Products Refining Company to petitioner in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time petitioner was directed to pay over all such accumulated income to said son. Thereafter and
7 until said Erard A. Matthiessen, should attain the age of 25 years petitioner was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that said Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that petitioner should pay over the principal in equal

shares to two other sons of the grantor. A copy of the above-mentioned indenture is attached hereto and marked "Exhibit B."

(c) Upon information and belief, the six thousand (6,000) shares of the common stock of Corn Products Refining Company, referred to in the preceding paragraph, were acquired by Conrad Henry Matthiessen on April 27, 1906, at a cost of $141,375, which cost exceeded the value of said shares on March 1, 1913.

(d) On December 24, 1921, the date on which the six thousand (6,000) shares of the common stock of Corn Products Refining Company, above referred to, were acquired by petitioner, they had a fair market value of not less than $96.25 per share, or a total fair market value of not less than $557,500.

(e) During the year 1922 the petitioner sold the six thousand (6,000) shares of the common stock of Corn Products Refining Company, above referred to, receiving therefor the net amount of $603,385.

(f) In computing the profit realized by petitioner upon the sale referred to in the preceding paragraph the respondent used as a basis the cost of such stock to Conrad Henry Matthiessen, referred to in paragraph 5 (c) above, instead of its fair market value as of
8 the date it was acquired by petitioner as set forth in paragraph 5 (d) above.

Wherefore, the petitioner prays that this board may hear the proceeding and disallow the alleged deficiency as set forth in paragraph 3 supra, to the extent of at least $237,458.79.

Respectfully submitted.

RUSSELL D. MORRILL,
Counsel for Petitioner,
14 Wall Street, New York City

[*Duly sworn to by Boyd G. Curtis, jurat omitted in printing.*]

9 *Exhibit "A" to petition*

TREASURY DEPARTMENT,
Washington, March 12th, 1927.

IT:PA:3-60D:JHJ.

Mr. ERARD MATTHIESSEN,
% New York Trust Company, Trustee,
100 Broadway, New York, New York.

SIR: The determination of your income-tax liability for the taxable year 1922, as set forth in office letter dated February 8, 1927, disclosed a deficiency in tax amounting to $238,275.95, as shown in the attached statement.

In accordance with the provisions of section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D.C., and must

be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:PA:3-60D:JHJ. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH.
Assistant to the Commissioner.

Inclosures: Statement; form A; form 882.

STATEMENT

In re: Mr. Erard Matthiessen, % the New York Trust Company, trustee, 100 Broadway, New York, New York.

Year	*Deficiency in tax*
1922	$238,275.95

Under date of February 8, 1927, you were advised that the report of the internal-revenue agent in charge at New York, New York, a copy of which was furnished you under date of May 22, 1926, had been reviewed in this office and approved as submitted.

The deficiency in tax of $238,275.95 resulted from the adjustment of income from sale of 6,000 shares of Corn Products Refining Company stock assigned by Conrad H. Matthiessen in 1921 to the New York Trust Company, as trustee, for your benefit.

In determining taxable profit from this transaction the examining officer used the difference between the selling price and the original cost of this stock to the donor, Conrad H. Matthiessen.

In a conference held in this office it was contended that taxable profits represented the difference between the selling price and the value of the stock at the time it was transferred to the trustee in 1921.

After careful consideration of the evidence submitted it is held that the profit as computed under article 1562, Regulations 62, is correct, and the findings by the examining officer are therefore sustained.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Exhibit "B" to petition

This indenture, dated the 24th day of December, 1921, by and between Conrad Henry Matthiessen, of New York City (hereinafter called the "grantor"), party of the first part, and the New York Trust Company, a New York corporation having its principal place of business at 100 Broadway, New York City (hereinafter
12 called the "trustee"), party of the second part: Witnesseth:

Whereas the grantor desires to create a trust for the benefit of his son Erard A. Matthiessen, in the manner hereinafter set forth, and the trustee is willing to accept and execute such trust.

Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth and for and in consideration of the sum of ten dollars ($10) by each of the parties hereto to the other in hand paid, the grantor has sold, assigned, transferred, and conveyed unto the trustee and, by these presents, does sell, assign, transfer, and convey unto the trustee, six thousand shares of the common stock of Corn Products Refining Company, in trust, nevertheless, for the benefit of Erard A. Matthiessen, and to be administered by the trustee under the following terms and conditions:

First. The trustee shall hold the said shares of stock or the avails thereof if said shares or any part thereof shall be sold, and any other securities or property purchased out of such avails, and collect the dividends and income therefrom and, until the twenty-first birthday of the said Erard A. Matthiessen, accumulate such dividends and income, investing such accumulations whenever practicable and convenient. When the said Erard A. Matthiessen attains his twenty-first birthday, the trustee shall pay over to him all of the cash or securities representing such accumulations of income and
13 thereafter the trustee shall pay to the said Erard A. Matthiessen the net income derived by the trustee from the trust estate hereby created until the said Erard A. Matthiessen shall attain the age of twenty-five years, whereupon the trustee shall pay over to the said Erard A. Matthiessen all of the trust estate as it then exists, both principal and any accrued but undistributed income, and the trust hereby created shall cease and come to an end.

Second. So long as the grantor is living, the trustee shall not sell and dispose of any of the shares of stock hereby conveyed or any other securities held as a part of the trust estate nor reinvest any cash at any time constituting a part of the trust estate without the written consent and approval of the grantor.

If the grantor shall die before the said Erard A. Matthiessen attains the age of twenty-five years then the trustee may sell the shares hereby conveyed or any other securities constituting any part of the trust estate and invest any cash constituting a part of the trust

estate in its discretion and in accordance with its best judgment, having in view the duration and nature of the trust; and the grantor hereby expressly releases the trustee from the limitations in respect of investment of trust funds which are provided by the laws of the State of New York.

Any dividends received by the trustee payable in stock of any corporation shall be added to the corpus of the trust estate unless and until the trustee is advised by counsel that such addition to the corpus constitutes in whole or in part an accumulation pro-
14 hibited by the laws of the State of New York, in which event the trustee shall pay over to the said Erard A. Matthiessen such part of such dividend as shall represent such illegal accumulation.

Third. If the said Erard A. Matthiessen shall die before attaining the age of twenty-five years, the trustee shall pay over the entire trust estate as it then exists in equal shares to C. H. Matthiessen, Jr., and Ralph H. Matthiessen, sons of the grantor, and the trust hereby created shall cease and come to an end.

Fourth. The grantor reserves the right to add to the corpus of the trust hereby created at any future time prior to the twenty-fifth birthday of the said Erard A. Matthiessen by delivering to the trustee additional securities or property to be held by the trustee under the terms and conditions of this agreement.

This agreement shall be deemed to be created and shall be administered under the laws and practice of the State of New York, and all rights of beneficiaries hereunder shall be determined by such laws.

Fifth. The trustee may keep shares of stock hereby conveyed and any other shares of stock or other securities hereafter acquired by it as a part of the trust estate in such name or names as shall be most convenient and practicable. The trustee shall not be liable for any loss to the trust estate for any investment made at the direction of the grantor nor for any loss or damage arising out of any investment made by it in the exercise of its power hereinabove granted to it, provided such investment shall be made in good
15 faith. The trustee shall not be liable except for its gross negligence or wilful misconduct. The trustee shall be entitled to a commission of ¼ of 1% on the principal, one-half to be paid on receiving the property and one-half upon paying out the principal at the termination of the trust estate, and shall be entitled to commissions on income at the rate of 1% of the annual income of the trust estate. The trustee may retain counsel or other agents or representatives necessary in the administration of the trust estate.

Sixth. The trustee accepts the trust hereby created.

Seventh. This agreement shall bind the heirs, executors, administrators, and assigns of the grantor and the successors and assigns of the trustee.

In witness whereof the grantor has hereunto subscribed his name and affixed his seal, and the trustee has caused this instrument to be executed by its vice president and its corporate seal to be affixed, duly attested by its secretary, the day and year first above written.

CONRAD HENRY MATTHIESSEN,
THE NEW YORK TRUST COMPANY,
By H. W. MORSE, *Vice President.*

Signed, sealed, and delivered in the presence of:
[SEAL] C. H. MATTHIESSEN, Jr.
Attest:
E. G. CURTS, *Secretary.*

16 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed July 8, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, in answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegation set forth in the paragraph of the petition numbered 1.

2. Admits the allegation set forth in the paragraph of the petition numbered 2.

3. Admits the allegations set forth in the paragraph of the petition numbered 3.

17 4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a), (b), (c), (e), and (f). Admits the allegations set forth in subparagraphs (a), (b), (c), (e), and (f) of the paragraph of the petition numbered 5.

(d) Denies the allegation set forth in subparagraph (d) of the paragraph of the petition numbered 5 for the reason that the commissioner has no knowledge of the facts alleged or information thereof, except as stated in the petition, sufficient to form a belief as to the truth of the allegations.

6. Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore it is respectfully prayed that the determination of the commissioner be approved.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of counsel:
J. F. GREANEY,
Special Attorney, Bureau of Internal Revenue.

18 Before United States Board of Tax Appeals

[Title omitted.]

Amended answer

Filed Dec. 7, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for amended answer to the petition herein admits and denies as follows:

1. Admits the allegation set forth in the paragraph of the petition numbered 1.

2. Admits that the notice of deficiency was mailed to the petitioner on March 12, 1927, and that the copy of said deficiency letter attached to the petition is a true copy.

3. Admits the allegation set forth in the paragraph of the petition numbered 3.

19 4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a-f) Admits the allegations set forth in subparagraphs (a) to (f), inclusive, of paragraph of the petition numbered 5.

Respondent alleges:

That immediately prior to May 22, 1926, Internal Revenue Agent Aaron J. Auerbach made an examination of petitioner's records as trustee for the benefit of Erard Matthiessen, a minor, under indenture dated December 24, 1921, and submitted a report thereon under date of May 22, 1926.

That a copy of said report was transmitted by the supervising internal-revenue agent at New York City to petitioner by letter of transmittal dated June 28, 1926, addressed "New York Trust Company, as trustee for Erard Matthiessen (a minor) of indenture dated December 24, 1921, 100 Broadway, New York."

That a copy of said report was transmitted by the supervising internal-revenue agent at New York City to the Commissioner of Internal Revenue by letter dated August 28, 1926.

That on September 15, 1926, the petitioner filed a protest to the recommendation of the internal-revenue agent, bearing a title on the face thereof—

"In the matter of the income-tax liability of the New York Trust Company as trustee for Erard Matthiessen (a minor) for the year 1922. Protest against additional tax liability proposed in a letter of the supervising internal-revenue agent dated June 28,

20 1926", which said protest was signed and verified by G. B. Paull, as assistant secretary of petitioner.

That a letter from the assistant to the Commissioner of Internal Revenue dated February 8, 1927, addressed, "Mr. Erard Matthies-

sen, % New York Trust Company, trustee, 100 Broadway, New York, New York", was sent to the petitioner advising that the revenue agent's report had been reviewed and disclosed a deficiency in tax for the year 1922 amounting to $238,275.95; that a "statement", which was an integral part of said letter, was attached to said deficiency letter and referred to the aforesaid report of the revenue agent dated May 22, 1926.

That by letter dated February 16, 1927, petitioner, as trustee for the Erard Matthiessen trust, requested a hearing in respect of said deficiency.

That by letter of February 25, 1927, addressed and sent to "New York Trust Company, trustee, Erard Matthiessen trust, 100 Broadway, New York, New York", C. R. Nash, assistant to the Commissioner of Internal Revenue, by E. A. Cook, assistant head of division, denied petitioner's request for postponement of said hearing, but later postponed said hearing to March 7, 1927, at which time a hearing was held, petitioner being represented by Russell D. Morrill, attorney of record for petitioner in this appeal.

That on March 12, 1927, the ~~deficiency letter, a true~~ copy of which (as heretofore admitted) is attached to the petition, was (as heretofore admitted) mailed to petitioner.

That by letter dated April 29, 1927, addressed and mailed to
21 "New York Trust Company, trustee, Erard Matthiessen (minor), 100 Broadway, New York, New York", C. R. Nash, assistant to the Commissioner of Internal Revenue, in response to a request from petitioner's counsel, amplified the statement which accompanied and is a part of the deficiency letter, and ruled in regard to the application of section 206 of the revenue act of 1921 to the instant appeal.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore it is prayed that the determination of the commissioner be affirmed.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
BROOKS FULLERTON,
Special Attorney, Bureau of Internal Revenue.
12/7/29.
[File endorsement omitted.]

22 Before United States Board of Tax Appeals

Docket No. 28250

NEW YORK TRUST COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of evidence

Filed Dec. 30, 1929

[Reporter's minutes].

Hearing at Washington, D.C., on the 9th day of December 1929, at 12:15 o'clock p.m.

The above-entitled cause came on for hearing on this the 9th day of December, A.D. 1929, before the honorable Stephen McMahon, member of the United States Board of Tax Appeals, at Washington, D.C., pursuant to notice of hearing heretofore given, whereupon the following proceedings were had and testimony heard, to wit:

APPEARANCES

Russell D. Morrill, Esq., 14 Wall Street, New York City, and Henry Mannix, Esq., 14 Wall Street, New York City, appearing on behalf of the petitioner;

Brooks Fullerton, Esq., (Clarence M. Charest, Esq., general counsel, Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, respondent.

23 PROCEEDINGS

The CLERK. The appeal of the New York Trust Company against the Commissioner of Internal Revenue, Docket No. 28250. For the petitioner, Mr. Russell D. Morrill, 14 Wall Street, New York City, and Mr. Henry Mannix, 14 Wall Street, New York City; for the respondent, Mr. Brooks Fullerton.

The MEMBER. How long will this case take?

Mr. MANNIX. Fifteen minutes, I think; we have agreed to the submission in evidence of certain exhibits, certain stipulations—we have already agreed to that, and I would just merely like to take about five minutes to point out the technical differences that are being raised in the matter, and then ask for permission to submit a brief, if the court feels it is not prepared to decide the case from the bench.

The MEMBER. I think we ought to recess now until 2 o'clock.

Mr. MANNIX. May I say this, Your Honor; I have an appointment for a hearing at 2 o'clock in the Income Tax Unit, and if you could allow us the time now to put this case in——

The MEMBER. Very well; we will accommodate you; may we have an opening statement from you at this time.

Opening statement on behalf of petitioner

Mr. MANNIX. The tax liability involved in this proceeding has to do with a profit alleged to have been derived on the sale of
24 6,000 shares of common stock of Corn Products Refining Company in the year 1922, held in the trust fund.

The donor of the trust was Conrad H. Matthiessen; the trustee is the New York Trust Company, of New York City; the primary beneficiary of this trust fund is Erard Matthiessen. The trust was created December 24, 1921.

There are two questions involving the merits of the liability and one involving a technical matter.

A return was filed by the trustee for the year 1922, reporting a profit on the sale of this stock based on value at the date of the creation of the trust. The Government has raised the question whether the profit should be measured by the cost of this stock to the donor of the trust, so that the first question on the merits is whether or not the value at the date of creation of the trust or the cost of the stock to the donor constitutes the basis for computing the profit.

The MEMBER. Would there be any substantial difference?

Mr. MANNIX. A very substantial difference.

The MEMBER. An increase in value?

Mr. MANNIX. Yes, sir.

The second question is whether, if the profit must be measured by the cost to the donor, the period during which the donor held the stock, prior to the creation of the trust, may be added to the period during which the trustee held the stock up to the date of sale in order to determine whether or not the stock was held for two years or more, in ascertaining whether or not the profit should be taxed at the twelve and one half percent capital gain rate.

25 Those are the two questions effecting the merits.

The third question, which is a technical matter, relates to whether or not the board has jurisdiction of this proceeding.

The thirty-day letter, which will be introduced in evidence, purports to be addressed to Mr. Erard Matthiessen, who is the beneficiary of the trust. I think the Government will concede there is no liability for the tax on the part of Erard Matthiessen, because he is the beneficiary, and the liability is on the trustee, if any.

The petition in the case was filed in the name of the trustee, and the defense that is raised, or about to be raised, by the petitioner is that the sixty-day letter is not a notice of deficiency, within the requirements of the statute, addressed to the New York Trust Company, as trustee, and that therefore the board has no jurisdiction to enter a deficiency assessment against the New York Trust Company as trustee.

Further that the board has no jurisdiction, or will have no jurisdiction, to enter a deficiency assessment against the beneficiary to whom the deficiency letter is addressed, for the reason that the record

in issue and the evidence in the case will show that as a matter of law there is no liability for tax on this profit of this beneficiary.

That, I think, outlines the questions involved, and if Mr. Fullerton has no objection, we will proceed with the introduction of the formal evidence.

The MEMBER. Do you wish to be heard, Mr. Fullerton?

26 Mr. FULLERTON. Just a short statement on the part of the respondent.

The MEMBER. Proceed.

Opening statement on behalf of respondent

Mr. FULLERTON. The respondent's position in regard to these questions on the merits is that the establishment of a trust and the turning of property over to the trustee is a gift, and that this giving has the same effect as though the gift were made to an individual and that when securities are sold by the trustee, the cost basis for determining profit would be the cost to the donor of the trust.

The matter is very substantial; the tax is for the year 1922, and the deficiency determined, on account of this difference of cost basis, amounts to a tax of two hundred and thirty-eight thousand dollars odd.

The petitioner's counsel has stated the matter, the other matter, on the merits.

The evidence will show that in regard to the jurisdictional question, that there was a clerical error in the sixty-day letter; but the record, the complete record, will be introduced in evidence to show that the trustee received several letters, had several conferences, and made several protests in regard to the matter; that nobody was under any mistake as to whom the Government's tax—or from whom the Government contended the tax was due, and that, the error being clerical the board has jurisdiction.

Motion to amend petition

Mr. MANNIX. The first thing I would like to do is to move

27 to amend our petition. I have already advised Mr. Fullerton of my intention to so move, and I do not think he will object to the amendment which I want to make.

As a matter of fact we received—I have not yet—well, I received a copy of an amended answer, filed on Saturday by Mr. Fullerton, due to the raising of this technical question of jurisdiction.

I wish to amend paragraph 2 of the petition so as to read as follows:

"The notice of deficiency (a copy of which is attached and marked 'Exhibit A') was mailed to Erard Matthiessen on March 12, 1927."

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to amend paragraph 4 (a) of the petition so as to read:

"The respondent has erroneously determined Erard Matthiessen's gross income for the year 1922", and so forth.

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to amend paragraph 4 (b) to read:

"(b) Insofar as section 202 (a) (2) of the revenue act of 1921 purports to authorize respondent to tax petitioner or Erard Matthiessen, an alleged profit upon the sale", and so forth, as the petition now stands.

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to add a new error, to be known as paragraph 4 (d) to read:

"That said Erard Matthiessen is not liable, as a matter of law, for any income tax on any profit derived on the sale of said Corn Products Refining Company stock."

Mr. FULLERTON. No objection.

28 Mr. MANNIX. I wish to amend the last paragraph in the petition so as to read as follows:

"Wherefore the petitioner prays that this board may hear the proceeding and disallow the alleged deficiency as set forth in paragraph 3, supra."

Omitting the following words from that paragraph:

"To the extent of at least $237,458.79."

In other words, as to the last amendment, I wish to request the disallowance of the deficiency en toto.

Those are the only motions with respect to amendments to the petition that I wish to make.

The MEMBER. You have no objection.

Mr. FULLERTON. I have no objection; but I would ask that the petition, as amended, be considered as denied by the respondent.

The MEMBER. Do you mean you wish to deny the allegations of fact?

Mr. FULLERTON. I wish the record to show that as the petition now stands the allegations which are contained in the amended portions are denied in the same instances where they were denied in the respondent's amended answer.

The MEMBER. Well, the motion to amend is granted, and counsel for the respondent is now permitted to enter an oral denial to these amendments in the record.

Mr. FULLERTON. That is satisfactory.

Mr. MANNIX. If Your Honor please, I want to make it clear just what position the respondent is taking, because before making this amendment I discussed the matter with him, and rather than

29 to have it appear that he has denied any of the material allegations of our petition, either of fact or of error contained in the original petition, which would require the introduction by me of evidence to meet such denials, I would prefer to withdraw any motion to amend and let the original petition stand as it was originally filed.

Now, I understood, in making the motion to amend, the only objection which Mr. Fullerton would make would be to paragraph

2, that he would deny that the notice of deficiency was mailed to Erard Matthiessen, but would not deny that the exhibit A attached was a true copy of the notice of deficiency.

Mr. FULLERTON. The allegation in regard to the true copy was not admitted; I merely wish to keep the record clear so that there were not new allegations here which had not been heretofore denied, that would stand as undenied. As the board expressed the matter, it was satisfactory to the respondent.

Mr. MANNIX. In other words, then, Mr. Fullerton merely denies any new allegations set forth in the proposed amendment, but does not deny any allegations previously admitted.

Mr. FULLERTON. Correct.

Mr. MANNIX. In his original answer.

The MEMBER. That is my understanding; so, now, then, to make it perfectly clear, the motion to amend the petition having been granted, you wish the record to show, as attorney for the respondent, that you deny the allegations now set forth in the amendments to the petition. Is that right?

Mr. FULLERTON. Yes; that is correct.

The MEMBER. I think that covers the situation.

30 Mr. MANNIX. It does not deny any of the allegations previously made in the original petition which were admitted by the respondent in his original answer?

The MEMBER. Yes; it is understood that there is no denial of the allegations of the original petition except those that were denied in the original answer to the original petition.

Mr. FULLERTON. Make that the amended answer to the original petition.

The MEMBER. All right, if that is agreeable to you. Now, Mr. Fullerton, let us dispose of this; I will let it stand the way I had it, that you are making no denial of anything that is admitted in the respondent's original answer to the original petition.

Mr. FULLERTON. The respondent's amended answer to the original petition.

The MEMBER. No; original answer to the original petition.

Mr. FULLERTON. I beg your pardon; there is an original answer and amended answer now on file; that was the reason I asked for that one correction.

Mr. MANNIX. That amended answer was not served on me; I received it this morning. If you will assure the court and myself that you have not denied anything which was admitted in your original answer, I am satisfied to let it rest as you have stated it.

Mr. FULLERTON. There is nothing denied in the amended answer which was admitted in the original answer, except in one instance where the original answer denied, for lack of information; the

31 amended answer denies outright one particular fact, but that is the fair market value of the security at the date of the establishment of the trust, and we will stipulate that.

Mr. MANNIX. It is satisfactory to let the record stand.

The MEMBER. All right. Now, let the record show the motion to amend the petition, as set forth by counsel for the petitioner, is granted; and the counsel for the respondent is permitted to enter a denial of those allegations as set forth in the amendment to the petition, provided there are no denials different than the denials contained in the amended answer of the respondent which is on file and which is about to be offered. Is that right?

Mr. FULLERTON. That is satisfactory to the respondent.

Mr. MANNIX. I now offer in evidence the original——

The MEMBER. Let us get the pleadings straightened up. Now, you have an amended answer you want to offer; it is on file but has not been acted on by the Board.

Mr. FULLERTON. Yes; the respondent will offer the amended answer.

The MEMBER. Is there any objection to that?

Mr. MANNIX. No.

The MEMBER. The motion of counsel for the respondent to be permitted to amend the answer of the respondent is granted, and the amended answer filed by the Board on December 7, 1929, is received as the answer of the respondent in this case.

Mr. MANNIX. Shall I proceed?

The MEMBER. Proceed.

32 *Offers in evidence*

Evidence for the petitioner

(Thereupon the petitioner, to maintain the material averments of its petition, introduced the following proof):

Mr. MANNIX. I now offer in evidence the original deed of trust, dated December 4, 1921, by and between Conrad Henry Matthiessen and the New York Trust Company.

Mr. FULLERTON. No objection.

The MEMBER. Mark it, Mr. Clerk.

Mr. MANNIX. I request permission to introduce, in lieu of the original trust indenture, a certified copy thereof with the same force and effect as if the original had been allowed to remain on file with the Board.

Mr. FULLERTON. No objection.

The MEMBER. You may mark the photostatic copy, then, as "Petitioner's Exhibit No. 1." Is that right, Mr. Clerk?

The CLERK. That is right, Your Honor.

The MEMBER. Petitioner's exhibit no. 1 will be received in evidence, there being no objection.

(The photostatic copy of trust certificate, so identified and received in evidence, was thereupon marked "Petitioner's Exhibit No. 1", and is made a part of this record.)

Mr. MANNIX. I offer in evidence, the original alleged notice of deficiency, being a letter from the Commissioner of Internal Revenue, dated March 12, 1927.

The MEMBER. Is there any objection to this, Mr. Fullerton?

Mr. FULLERTON. No objection.

33 The MEMBER. That exhibit will be marked "Petitioner's Exhibit No. 2", and will be received in evidence.

(The document so identified and received in evidence was thereupon marked "Petitioner's Exhibit No. 2", and is made a part of this record.)

Mr. MANNIX. I offer in evidence the original income-tax return for the year 1922 filed by the New York Trust Company as trustee for Erard Matthiessen, a minor.

Mr. FULLERTON. No objection.

The MEMBER. The return will be marked "Petitioner's Exhibit No. 3", and will be received in evidence.

(The document so identified and received in evidence was thereupon marked "Petitioner's Exhibit No. 3", and is made a part of this record.)

Mr. MANNIX. There are now to be made of record one or two stipulations of fact. Will you read the stipulations of fact?

The MEMBER. Are there any depositions in this case?

Mr. MANNIX. No, Your Honor; everything is admitted in the answer that is required.

Stipulation

Mr. FULLERTON. It is stipulated that the Commercial and Financial Chronicle as of December 24, 1921, shows quotations for the common stock of the Corn Products Refining Company as follows, high 96½, low 96, and that actual sales were made at those prices on the New York Stock Exchange on that date.

34 The MEMBER. You have heard the stipulation just stated, Mr. Mannix: Is that acceptable to you?

Mr. MANNIX. That is acceptable to me.

The MEMBER. The stipulation will be received as evidence of the market value of this stock on the date in question. Is that what it is for?

Mr. MANNIX. That is satisfactory; that is the purpose of it.

Mr. FULLERTON. The respondent would rather not admit that that was the market value; we will admit that that was what the actual sales on the exchange showed at that time, and that sales were made at that figure.

The MEMBER. Well, I have said that this stipulation is being received in evidence, as evidence—some evidence of the market value of that stock on that date.

Mr. FULLERTON. Yes.

Mr. MANNIX. That is the purpose of that stipulation.

Stipulation

Mr. MANNIX. A further stipulation, I understand, is satisfactory to Mr. Fullerton:

It is stipulated no Federal income-tax return was filed by Erard Matthiessen or by anyone in his behalf for the year 1922.

Mr. FULLERTON. Correct.

The MEMBER. You mean other than petitioner's exhibit 3; that, we claim, is an income-tax return filed by the trustee for the trust. Restate your stipulation.

Mr. MANNIX. It is stipulated no Federal income-tax return
35 was ever filed by Erard Matthiessen or by anyone in his behalf for the year 1922.

The MEMBER. You have heard the stipulation, Mr. Fullerton?

Mr. FULLERTON. Correct.

The MEMBER. Is that acceptable to you?

Mr. FULLERTON. It is.

The MEMBER. The stipulation will be received in evidence.

Stipulation

Mr. MANNIX. It is stipulated that Erard Matthiessen did not reside at 100 Broadway, New York, New York, nor use that as his address for any purpose at any time.

Mr. FULLERTON. That is correct.

The MEMBER. You have heard the stipulation.

Mr. FULLERTON. Yes.

The MEMBER. The stipulation is received.

Mr. MANNIX. Those are the only stipulations and offers in evidence I wish to make; Mr. Fullerton, I think, wishes to offer something.

The MEMBER. All right; then you rest, Mr. Mannix?

Mr. MANNIX. I rest.

Offers in evidence

Evidence for the respondent

(Thereupon the respondent, to maintain the issues on his part, introduced the following proof):

Mr. FULLERTON. The respondent offers a copy of the revenue agent's report upon the New York Trust Company, as trustee
36 for Erard Matthiessen, for the years 1922 and 1923. It is agreed between counsel that no objection will be made because this is a copy and not an original.

Mr. MANNIX. That is correct, but I do——

The MEMBER. You have other objections?

Mr. MANNIX. I wish to object on the ground——

The MEMBER. Let us have it marked—is there more than one?

Mr. FULLERTON. There are a number of exhibits; this is the first one.

Mr. MANNIX. Your Honor, I will make the same objection to all of these exhibits; perhaps it might be well to reserve my right to object to them.

The MEMBER. That will be marked "Respondent's Exhibit A."

(The revenue agent's report, so identified and received in evidence, was thereupon marked "Respondent's Exhibit A", and is made a part of this record.)

Mr. FULLERTON. Perhaps I should state that the exhibit contains the report mentioned and the subsequent correspondence down to the sixty-day letter, and one letter after that.

The respondent offers in evidence the letter from the supervising internal-revenue agent at New York to the New York Company—New York Trust Company, as trustee for Erard Matthiessen, dated June 28, 1926, and purporting to transmit to the petitioner the document which is the revenue agent's report just offered.

The MEMBER. Is this an original or a copy?

Mr. FULLERTON. This is a copy.

The MEMBER. Mark it "Respondent's Exhibit B."

37 (The document so identified and received in evidence was thereupon marked "Respondent's Exhibit B", and is made a part of this record.)

Mr. FULLERTON. Respondent offers the letter from the supervising revenue agent at New York to the Bureau of Internal Revenue, transmitting copy to that bureau of what is marked as respondent's exhibit A.

The MEMBER. It will be marked "Respondent's Exhibit C" for identification.

(The document so identified was thereupon marked "Respondent's Exhibit C", for identification.)

Mr. FULLERTON. Respondent offers a protest dated September 15, 1926, by the petitioner to the recommendation in the revenue agent's report.

The MEMBER. It will be marked "Respondent's Exhibit D" for identification.

(The document so identified was thereupon marked "Respondent's Exhibit D", for identification.)

Mr. FULLERTON. The respondent offers a letter with a statement attached, which is part of the letter dated February 8, 1927, from the Assistant to the Commissioner of Internal Revenue, addressed to Mr. Erard Matthiessen, % New York Trust Company, trustee.

The MEMBER. It will be marked "Respondent's Exhibit E", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit E", for identification.)

Mr. FULLERTON. Respondent offers a letter dated February

38 16, 1927, from the New York Trust Company to the Commissioner of Internal Revenue.

The MEMBER. It will be marked "Respondent's Exhibit F", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit F", for identification.)

Mr. FULLERTON. Respondent offers a copy of a letter dated February 25, 1927, from the assistant to the commissioner by E. A. Cook, addressed to the New York Trust Company, trustee, Erard Matthiessen trust.

The MEMBER. It will be marked "Respondent's Exhibit G", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit G", for identification.)

Mr. FULLERTON. The respondent offers a letter dated April 29, 1927, from C. R. Nash, assistant to the commissioner to New York Trust Company, trustee for Erard Matthiessen.

The MEMBER. It will be marked "Respondent's Exhibit H", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit H", for identification.)

Mr. FULLERTON. Now, there was a small stipulation, but it should wait until after these are disposed of.

The MEMBER. Let us dispose of these now. Now, these first two exhibits—you have them marked as "Exhibit A and B." Is that right, Mr. Clerk?

The CLERK. The revenue agent's report is marked "A"; I understand that is in error.

39 The MEMBER. No; that was not in error; none of them have been admitted; you have two marked as "Exhibits A and B."

The CLERK. That is correct.

The MEMBER. The other exhibits from C to H, inclusive, have been marked for identification?

The CLERK. That is correct.

The MEMBER. We will have the objection.

Mr. MANNIX. Petitioner objects to the introduction or admission in evidence of all of the exhibits thus far offered by the respondent on the ground that such exhibits are incompetent, irrelevant, and immaterial to the issue involved. I understand that they are offered by the respondent for the purpose of meeting the jurisdictional question raised by the petition.

It is the petitioner's contention that the law requires the sending by the commissioner of a registered notice of deficiency to the taxpayer, which notice of deficiency must be addressed to the taxpayer against whom the deficiency is asserted by the commissioner.

We contend that the alleged 60-day letter which has heretofore been introduced in evidence by the petitioner is not addressed to the New York Trust Company as trustee, but is addressed to Erard Matthiessen, a beneficiary of the trust hereinbefore referred to; therefore the correspondence between the trust company and the commissioner, or the reports made by the revenue agent prior to the issuance of the 60-day letter, have no bearing at all on whether or not

a valid 60-day letter was issued, or a valid notice of deficiency was issued in accordance with the statute; I also object to the admissibility in evidence of the letter dated April 29, 1927—

40 The MEMBER. What exhibit is that?

Mr. MANNIX. Exhibit H of respondent—for the reason—for the same reasons as stated with respect to the other exhibits and for the additional reason that said exhibit is a letter dated subsequent to the issuance of the sixty-day letter and is therefore incompetent, irrelevant, and immaterial to the issue involved.

The MEMBER. But you waive the objection that these are copies instead of originals?

Mr. MANNIX. I do.

The MEMBER. You are willing that these copies shall be accepted in lieu of the originals?

Mr. MANNIX. I do.

The MEMBER. To be treated as originals, but subject to all of your other objections.

Mr. MANNIX. Yes, sir.

The MEMBER. What have you to say, Mr. Fullerton?

Mr. FULLERTON. The exhibits introduced show the facts about in this manner:

That the revenue agent made a report on the New York Trust Company as trustee for Erard Matthiessen, and that a copy of that report was sent to the New York Trust Company by letter of transmittal addressed to the New York Trust Company as trustee; that they filed a protest as the New York Trust Company, trustee; to the recommendation of the revenue agent on that letter, and in that letter the New York Trust Company asked for—well, I think that covers it.

After that protest a letter, a thirty-day letter, dated February 8, 1927, issued and by error of the bureau it was entitled "Erard Matthiessen, care of New York Trust Company, trustee",

41 instead of being, as it should have been, "Erard Matthiessen trust, New York Trust Company, trustee"; in other words, the word "trust" was omitted after the name of the beneficiary, and the symbol "in care of" was added in front of the name of the trustee, where it should not have been added, and then, after the issuance of that letter of February 8, 1927, the New York Trust Company as trustee asked for a conference in regard to the matter, and counsel and I will stipulate shortly that such a conference was had and that the representative of the New York Trust Company, trustee, was present at that conference; the letter which postponed the conference and set the date of the conference from March 7, 1927, was addressed to New York Trust Company, trustee; but when the deficiency letter of March 12, 1927, was issued, the same error occurred which had occurred in the letter of February 8th, the deficiency letter being entitled "Erard Matthiessen, % New York Trust Company, trustee", the deficiency was the same deficiency which had been discussed as the petitioner's deficiency throughout the whole matter before the bureau; then on April 29th this last letter issued, which was a ruling on

the application of section 206 of the revenue act of 1921, and was supplemental to the deficiency letter—a ruling made at the request of the taxpayer, and that letter was addressed to the New York Trust Company, trustee.

In the light of all of the record and the correspondence the respondent agrees that there was no mistake in the minds of anyone in this matter that the deficiency was being proposed against the fiduciary and not against the beneficiary in this respect, and regarding the admissibility of these exhibits I would call attention of the Board in the case of Wilkins vs. Lang (9 B.T.A., page 1127), in which a very similar situation occurred; all through the record they had discussed the year 1920, but by a clerical error the year 1919 was the year appearing in the deficiency letter, and the Board held that it was merely a technical error—that nobody was injured and that no one was under any mistake as to whether or not it was the year 1919 or the year 1920, but that the Board had jurisdiction. It is for this reason that I believe that the record in this case is admissible to show what that error was.

42

Mr. MANNIX. May I say a word?

The MEMBER. Yes, sir.

Mr. MANNIX. I may call the court's attention first to the statement that the error alleged to have been committed is the omission from the letter, after the name Mr. Erard Matthiessen, the word "trust"—if that be the error as claimed; even in those circumstances this deficiency letter would be invalid for the reason that a trust is not a taxable person. If any attempt was made to determine a deficiency against the trustee, the notice of deficiency should have been addressed to the trustee, and not to the trust fund, which is not a taxable entity.

I may also call your attention, if Your Honor please, to numerous decisions of the Board, which I will be glad to cover in a memorandum, referring to the fact that the law requires that a notice of deficiency must be addressed to the taxpayer; if a notice of deficiency is not addressed to the taxpayer, the Board has no jurisdiction to render a deficiency assessment against that taxpayer, regardless of who files the petition.

43

Therefore the issue involved in this proceeding with respect to the jurisdictional point is whether or not a deficiency notice in compliance with the statute was addressed to the New York Trust Company as trustee on this trust, or whether deficiency notice was addressed to Mr. Erard Matthiessen, an individual beneficiary of the trust.

With respect to the case cited by Mr. Fullerton it appears from his statement that a deficiency notice was properly addressed to the taxpayer in that proceeding, but that a mistake was made in the deficiency letter with respect to the amount of the deficiency, or with respect to the nature of the deficiency; but the board nevertheless had jurisdiction with respect to that particular petitioner and tax-

payer, because a valid notice of deficiency had been sent and addressed to that taxpayer.

I might also call Your Honor's attention to the letter itself, dated March 12, 1927, which is addressed to Mr. Erard Matthiessen, % New York Trust Company, trustee, 100 Broadway, New York, New York. The first word in the letter is "Sir", which purports to be the address used to an individual, and not "sirs."

They refer in the letter to a previous letter dated February 8, 1927, which letter is one of the exhibits of the respondent, and that letter is addressed to Mr. Erard Matthiessen. Further down
44 in the last paragraph they refer to form A, enclosed as an enclosure in the letter, which is part of and attached to respondent's exhibit, being the deficiency letter. That form is headed "In re Mr. Erard Matthiessen"; on the statement attached to the second page of the deficiency letter the paragraph—the statement is addressed "In re Mr. Erard Matthiessen, % New York Trust Company, trustee", and the first paragraph reads:

"Under date of February 8, 1927, you were advised";

the most important piece of evidence in the letter in our favor, however, is contained in the second paragraph of that statement, which reads as follows:

"The deficiency in tax of $238,275.95 resulted from the adjustment of income from sale of 6,000 shares of Corn Products Refining Company stock, assigned by Conrad H. Matthiessen to the New York Trust Company, as trustee, for your benefit."

Obviously that letter is addressed to Erard Matthiessen, for whose benefit that stock was assigned in the trust.

Further down in the fourth paragraph is a reference to the value of the stock at the time it was transferred to the trustee in 1921, thus referring to the trustee as a third party. It does not say "transferred to you" in 1921, which would be the natural way the statement would be phrased if this letter and statement were addressed to the trustee.

Having all of those things in mind, we contend that the Board is without jurisdiction to enter a deficiency against the trustee.
45 Mr. FULLERTON. May I correct counsel's statement in the one particular? I said that the errors on the deficiency letter was not only the omission of the word "trust" but also the adding of the symbol "%" before the words "New York Trust Company."

The MEMBER. Exhibits A and B and Exhibits C and F, inclusive, which are marked for identification, as offered by counsel for the respondent, will be received in evidence, subject to the objections by counsel for the petitioner.

Mr. MANNIX. May I have an exception of Your Honor's ruling?

The MEMBER. An exception will be granted if the ruling is adverse.

Mr. FULLERTON. Pardon me, but did that dispose of Exhibit G?

The MEMBER. That includes A, B, C, D, E, F, G, and H.

Mr. FULLERTON. I beg your pardon; I misunderstood; I thought you meant to exclude Exhibit H.

The MEMBER. No; I think I said to "H", inclusive.

Mr. FULLERTON. I misunderstood; I beg your pardon.

The MEMBER. But all of these exhibits now offered by counsel for the respondent will be received subject to the objection of counsel for the petitioner, and in the event of an adverse final ruling an exception will be granted, and these exhibits that have now been marked for identification will be marked as exhibits, Mr. Clerk.

(The documents which had been previously marked for identification as respondent's Exhibits A, B, C, D, E, F, G, and H, respectively, were thereupon received in evidence and marked, respectively, "Respondent's Exhibits A, B, C, D, E, F, G, and H", and are made a part of this record.)

46

The MEMBER. Is there anything further to offer, Mr. Fullerton?

Stipulation

Mr. FULLERTON. It is stipulated and agreed by respective counsel that on March 7, 1927, the representative of the petitioner held a conference concerning the tax here involved with the Bureau of Internal Revenue.

The MEMBER. You have heard the stipulation?

Mr. MANNIX. That is satisfactory.

The MEMBER. The stipulation of the parties will be accepted.

Mr. FULLERTON. That is all for the respondent.

Mr. MANNIX. That is all the evidence for the petitioner.

The MEMBER. Both sides rest?

Mr. FULLERTON. Yes, sir.

The MEMBER. I wish briefs from both sides on this case. When may be have yours, Mr. Fullerton?

Mr. FULLERTON. May I have until the 5th of January 1930?

Mr. MANNIX. May I have the same period of time?

The MEMBER. Yes; now, then, briefs will be submitted by both parties on or before January 5, 1930; they will be submitted simultaneously; that is, they will not be exchanged.

47

Mr. MANNIX. If we want to submit our brief directly, we can submit our brief to the board directly before the 5th of January, but not give it to counsel for the respondent.

The MEMBER. You are not obliged to exchange briefs; they are to be submitted simultaneously to the board by January 5.

Mr. MANNIX. May I express my thanks and appreciation of Your Honor's waiting until we finished this matter?

The MEMBER. That is all right; this case is closed now waiting to receive the briefs, and this division will recess until 2:30.

(The above and foregoing is all of the proceedings had and testimony heard on the hearing of the above cause; whereupon at 1:25 o'clock p.m. the hearing in the above matter was concluded.)

Form 1040

U. S. Internal Revenue

(Auditor's Stamp)

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000

OR JOINT RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $ 00

For Calendar Year 1922

For fiscal period beginning ....., 1921, and ended ....., 1922

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Period

(PRINT NAME AND ADDRESS PLAINLY BELOW)

[illegible] AS TRUSTEE FOR

EARNO MATTHIESEN (A MINOR)

OF INDENTURE DATED DEC 27, 1921.

100 BROADWAY

(Street and number, or rural route)

NEW YORK CITY

(Post office) (County) (State)

Do Not Write in These Spaces

SERIAL NUMBER

32093

DIST. CODE 23

DIST. SYMBOL

$ 2717-

Examined by

(Cashier's Stamp)

Ck. Check M. O. Cert. of Int.

BEC A

ASSESSMENT

Tax - - - 238275 90

Penalty - -

Interest - 105476.26

Total 343752.21

Date Ck or M.O. Rec'd 5-25-26

Audited by ARNOLD PAUL

Unit No. PA 3

LIST ..... DEC 1 1920

Page 0 Line 0

OCCUPATION, PROFESSION, OR KIND OF BUSINESS .....

1. Are you a citizen or resident of the United States? Yes

2. If you filed a return for 1921, to what Collector's office was it sent? .....

3. Is this a joint return of husband and wife, or of a person and a minor child?

4. If not, is a separate return being filed by your husband or wife? .....

If so, state: (a) Name and address entered at head of that return .....

5. Were you married and living with husband or wife on the last day of your taxable period? No

6. If not, were you on the last day of your taxable period supporting and living in your household who are closely related to you by blood, marriage, or adoption?

7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable period? .....

INCOME

	Amount received	Expenses paid (Deductible)
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received.)	$	$
2. Income from Business or Profession. (From Schedule A)		
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	3370 14	
4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)		
5. Rents and Royalties. (From Schedule B)		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	1032 50	
7. Dividends on Stock of Domestic Corporations	27201 25	

3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds		3370 14
4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)		
5. Rents and Royalties. (From Schedule B)		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)		1032 50
7. Dividends on Stock of Domestic Corporations		27201 25
8. Taxable Interest on Liberty Bonds, etc. (From Schedule E)		
9. Other Income (including dividends received on stock of foreign corporations). (State nature of income.)		
(a)		
(b)		
(c)		
10. TOTAL INCOME IN ITEMS 1 TO 9		29508 87
DEDUCTIONS		
11. Losses by Fire, Storm, etc. (Explain in Schedule F)		
12. Interest Paid Accrued int. to purchase mortgage. taxable Bonds.	55 83	227 23 / 351 83
13. Taxes Paid Transfer Tax.		160 X
14. Bad Debts. (Explain in Schedule G)		
15. Contributions. (Explain in Schedule G)		
16. Other Deductions Authorized by Law. (Explain in Schedule G) Amortization Commissions paid The My Trust Co. coll. income.		82 / 232 68 / 1619 11
17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16		1620 16 X
18. NET INCOME (Item 10 minus Item 17)		27888 73

COMPUTATION OF TAX

19. Net Income (Item 18 above)		27888 73	27. Normal Tax 4% of Item 26)	- 0 -
20. Less: Dividends (Item 7 above)	27201 25		28. Normal Tax 8% of Item 26)	- 0 -
21. Taxable Interest on Liberty Bonds etc. (Item 8 above)	- 0 -		29. Surtax on Item 19 (see Instruction 29)	1187 76
22. Personal Exemption and Credit for Dependents	1000		30. Tax on Capital Net Gain (12½% of column 9, Schedule D) (see Instruction 6)	10923 13
23. TOTAL OF ITEMS 20, 21, AND 22		28201 25	31. Total Tax 12½% of Net Income 11,278.73	14092 21
24. Balance (Item 19 minus Item 23)		- 0 -	32. Less: Income Tax paid at source	17 50
25. Amount taxable at 4% (not over $4,000)		- 0 -	33. Income and profits taxes paid to foreign countries or possessions of the U. S. (attach Form 1116)	17 50
26. Balance taxable at 8% (Item 24 minus Item 25)		- 0 -	34. Balance of Tax (Item 31 minus Items 32 and 33)	14074 71

In computing tax for a fiscal year, see Article 1624 of Regulations 62

Checks and drafts will be accepted only if payable

k1

Petitioner's Exhibit No. 3

25

48

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION. (See Instruction 2.)

1. Total income from business or profession ..... $

Cost of Goods Sold:

2. Labor ..... $
3. Material and supplies .....
4. Merchandise bought for sale .....
5. Other costs (list principal items and amounts below or on separate sheet) .....
6. Plus inventory at beginning of year .....
7. TOTAL (Lines 2 to 6, inclusive) ..... $
8. Less inventory at end of year .....
9. NET COST OF GOODS SOLD (Line 7 minus Line 8) ..... $

State amount of salary to self included in Item 10 ..... $

Explanation of deductions claimed on Lines 5, 14, and 16 .....

OTHER BUSINESS DEDUCTIONS:

10. Salaries and wages not reported as "Labor" on line 2 (see Instruction 1) ..... $
11. Rent on business property in which taxpayer has no equity .....
12. Interest on business indebtedness to others .....
13. Taxes on business and business property .....
14. Repairs, wear and tear, obsolescence, depletion, and property losses (explain below) .....
15. Bad debts arising from sales or professional services .....
16. Other expenses (list principal items and amounts below or on separate sheet) .....
17. TOTAL (Lines 10 to 16, inclusive) ..... $
18. TOTAL DEDUCTIONS (Line 9 plus Line 17) ..... $
19. NET INCOME (Line 1 minus Line 18) (Enter as Item 2) ..... $

SCHEDULE B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5.)

1. KIND OF PROPERTY.	2. AMOUNT RECEIVED.	3. COST, OR VALUE MARCH 1, 1913.	4. DEPRECIATION AND DEPLETION.	5. REPAIRS.	6. OTHER EXPENSES.	7. NET INCOME (Enter as Item 3).
	$	$	$	$	$	$

State estimated life of property, and depreciation previously taken .....

SCHEDULE C.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. AMOUNT RECEIVED.	4. DEPRECIATION.	5. COST.	6. VALUE MARCH 1, 1913.	7. SUBSEQUENT IMPROVEMENTS.	8. NET [illegible] (Enter as Item 4).
Liberty Loan Int. Exp. Fds.	1922	$ 21005 —	$ — 0 —	$ 20057 50	$ — 0 —	$	$ 1022 50

If not acquired by purchase, state how acquired .....

SCHEDULE D.—CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. DATE SOLD.	4. AMOUNT RECEIVED.	5. DEPRECIATION.	6. COST.	7. VALUE MARCH 1, 1913.	8. SUBSEQUENT IMPROVEMENTS, AND CAPITAL DEDUCTIONS.	9. NET GAIN (Enter Tax of 12½%, as Item 30)
U. S. Liberty Loan Conv. 4¼%	3/15/22	1922	$ 608385 —	$ — 0 —	$ 576000 —	$ 72750 —	$	$ 17385 —

If not acquired by purchase, state how acquired .....

[illegible] (See Instruction 8.)

If not acquired by purchase, state how acquired

SCHEDULE D.—CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 6.)

1. Kind of Property.	2. Date Acquired	3. Date Sold.	4. Amount Received.	5. Depreciation.	6. Cost.	7. Value March 1, 1913.	8. Subsequent Improvements and Capital Deductions.	9. Net Gain (Enter Tax of 12½% as Item 30)
[illegible]	[illegible]	1922	$608 926 —	$ — 0 —	$ 576 000 —	$ 72760 —	$	$ 27 226

If not acquired by purchase, state how acquired

SCHEDULE E.—TAXABLE INTEREST ON LIBERTY BONDS, ETC. (See Instruction 8.)

1. Obligations of the United States Issued Since September 1, 1917. (Wholly exempt from normal tax, but subject to surtax as to excess over exemptions specified.)	Exemptions. (Aggregate Principal Amount.) 2. $30,000.	3. $[illegible].	4. $[illegible].	5. Principal Amount in Excess of Exemptions Specified in Columns 2, 3, and 4.	6. Interest on Principal Amount in Excess of Exemptions.
(a) First Liberty Loan Second Converted 4¼% Bonds		$	$	$	$
(b) First and Second 4's and First, Second, Third, and Fourth 4¼'s	NONE				
(c) Treasury 4½% Bonds, Treasury Certificates, Treasury and War Savings Certificates	NONE	NONE			
(d) Victory Liberty Loan 4¼% Notes, and Treasury Notes	NONE	NONE	NONE		
(e) Total Taxable Interest (*If you have bought or sold during the year attach statement showing dealings by periods*). (Enter as Item 8)					$

SCHEDULE F.—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 11.)

1. Kind of Property.	2. Cost, or Value March 1, 1913.	3. Depreciation Previously Taken.	4. Salvage Value.	5. Insurance.	6. Net Loss. (Enter as Item 11).
	$	$	$	$	$

SCHEDULE G.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 15, AND 16.

AFFIDAVIT.

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1921 and the Regulations issued under authority thereof.

(If return is made by agent, the evidence therefor must be stated on this line.)

Sworn to and subscribed before me this 5th day of March, 1923.

[illegible]
(Signature of individual or agent)

[illegible]
(Official character administering oath.) (Title.) (Address of individual or agent.)

(An amended return must be plainly marked "Amended" across face of return.)

17

[illegible]

51 *Petitioner's Exhibit No. 3*

THE NEW YORK TRUST COMPANY,
100 Broadway, New York, March 15, 1923.

(Endorsed:) Collector of internal revenue, 2d Dist., N.Y. Received Mar. 15, 1923.

Honorable FRANK K. BOWERS,
Collector of Internal Revenue,
Customhouse, New York City.

DEAR SIR: We enclose individual income-tax return for the year 1922 filed by the New York Trust Company as trustee for Erard Matthiessen (a minor).

The total tax shown on this return is $14,391.71.

We also enclose our cheque to your order for $3,597.92 to pay the first quarterly installment due when the return is filed.

This return is hereby filed for the reason that the securities sold in accordance with Schedule D at a market value of $577,500, when received by the trustee on December 24, 1921. Such securities were sold for $603,385, thereby deriving a profit of $25,885.

The trustee respectfully protests the requirement that the cost of the securities to the donor be used as a basis for determining the profit derived on the sale of the securities by the trustee.

Yours very truly,

G. B. PAULL.
Tax Department.

MDT/BM. Enclosures.

52 The securities sold in accordance with Schedule D had a market value of $577,500.00, when received by the trustee on December 24, 1921. Such securities were sold for $603,385.00, thereby deriving a profit of $25,885.00. The trustee respectfully protests the requirements that the cost of the securities to the donor be used as a basis for determining the profit derived on the sale of the securities by the trustee.

Respondent's Exhibit A

(Endorsed:) U.S. Board of Tax Appeals, Div. 16, Docket 28250. Admitted in evidence Dec. 9, 1929.

Office of supervising internal revenue agent, New York Division,
Customhouse Building

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
New York, N.Y., May 22, 1926.

In re New York Trust Co., as trustee for Erard Matthiessen (a minor) of indenture dated Dec. 24, 1921, 100 Broadway, New York, N.Y.

Examining officer	Examination commenced	Examination completed
A. J. Auerbach	May 12, 1926	May 22, 1926

Supervising revenue agent, customhouse, New York, N.Y.

An examination of the books and records of the above-
53 named taxpayer for the years 1922 and 1923, inclusive, disclosed the following in connection with its income and liability:

53 *Summary*

Years	Additional tax
1922	$238,275.95
1923	None
Total	238,275.95

Kind of business: Investments, receiving interest and dividends on stocks and bonds.

Authority for examination: Original return for 1922.

Other remarks: All items in connection with this examination were discussed with Mr. Thompson, and Mr. G. B. Paull, of the New York Trust Co., the latter, on behalf of the New York Trust Co., signified an intention to protest against additional tax recommended.

The New York Trust Co. filed a fiduciary report for 1923 because Mr. Erard Matthiessen became of age in 1923, and filed a 1040. An examination of the fiduciary return filed for 1923 showed all items of income and deduction correctly reported; examination of fiduciary for 1923 made from retained copy.

This examination was made in this office and report submitted in accordance with authority granted by the bureau.

(Signed) AARON J. AUERBACH,
Internal Revenue Agent.

Index: Pages covered, 4; schedules 1 to 2.

Encl. orig. return for 1922.

DC.

N.Y. Trust Co. as trustee for Erard Matthiessen (a minor)

54 *Schedule 1*

Block adjustments	Return	Additions to income	Year 1922, corrected
3. Interest	$3,340.14		$3,340.14
6. Sale of securities	(1,032.50)	$462,010.00	460,977.50
7. Dividends	27,201.25		27,201.25
10. Total	29,508.89	462,010.00	491,518.89
12. Interest	1,088.06		1,088.06
13. Taxes	160.00		160.00
16. Other deductions	372.10		372.10
17. Total	1,620.16		1,620.16
18. Net income	27,888.73	462,010.00	489,898.73

Schedule 1-A

All items of income and deduction were found to be correct with the following exception: The taxpayer originally reported as a capital net gain, taxable at 12½% in accordance with section 206 of the

1921 act, $87,385.00, representing gain on sale of 6,000 shares of common stock issued by the Corn Products Refining Co. The taxpayer set up the following schedule in connection with this transaction:

Kind of property	Date acquired	Amount recd.	Cost	3/1/13 value	Net gain
6,000 shares Corn Products Refining Co. common.	Acquired by grantor of trust prior to 3/1/13.	$603,385	$516,000	$72,750	$87,385

On December 24, 1921, the New York Trust Co. received as trustee, in addition to other property, 6,000 shares of Corn Products Refining Co. common stock, from Conrad H. Matthiessen, who had executed an irrevocable trust for the benefit of the latter's son Erard Mat-
55 thiessen (a minor), naming the New York Trust Co. as trustee.

The latter sold 6,000 shares of Corn Products Refining Co. common stock in 1922 for $603,385, and in order to prepare the 1922 Federal income-tax report as trustee for the minor, in accordance with the provisions of the 1921 Act, communicated with Mr. Conrad H. Matthiessen with a view to ascertaining the cost of the 6,000 shares in question to him; in a letter dated Nov. 30, 1922, to Mr. Morse, an officer of the New York Trust Co., Mr. Conrad H. Matthiessen, in part, replied as follows:

(Explanation of items)

"Regarding the income-tax return for my son Erard's trust fund, the Corn Products common will have to be figured on the cost basis to me of 86."

The New York Trust Co. accordingly inserted, as cost, $516,000 (6,000 shares, @ $86 per share). As a result of several conferences with Mr. Thompson and Mr. G. B. Paull, of the New York Trust Co., it was admitted that the latter is not in a position at the present time to be able to prove the correctness of $86 per share as cost to Mr. Conrad H. Matthiessen; also that because of the inability on the part of the Trust Co. to get any information from Mr. C. H. Matthiessen pertinent to the cost of the stock in question, the likelihood of ever establishing and proving the stated cost is extremely remote.

The Trust Co. offered for my inspection a copy of a brief filed March 19, 1924, in re proposed additional assessment against Conrad H. Matthiessen, % New York Trust Co., New York,
56 N.Y., in connection with an examination of returns for 1918, 1919, 1920, as shown in revenue agent's report dated July 31, 1923, attached to supervising internal revenue agent at New York City's letter dated October 30, 1923.

From this brief I have extracted certain data which I am herewith submitting for purposes of substantiating the basic figure of cost of 6,000 shares in question, which I have used in arriving

at the taxable net profit incident to the sale of 6,000 shares in question.

The Corn Products Refining Co. was formed in 1906 by reorganization of the Corn Products Co.; the latter company was organized Feb. 6, 1902, as holding company for the Glucose Sugar Refining Co., National Starch Co., Chas. Pope Glucose Co., Illinois Sugar Refining Co.

The Glucose Sugar Refining Co. was organized 1897, and was itself a result of a consolidation of a number of glucose and sugar refining companies, including the Chicago Sugar Refining Co., in which the father and uncle of Mr. Conrad H. Matthiessen were the principal stockholders.

The Glucose Sugar Refining Co. was promoted by the Matthiessens and others; it is estimated that $3,500,000 common stock was issued as promoters' fees.

On Jan. 29, 1906, Mr. Conrad H. Matthiessen deposited 21,000 shares of Corn Products Co. common stock and received in exchange on April 27, 1906, 14,000 shares of Corn Products Refining Co. common stock, as follows:

Certificates C3868 continuously through C4007, each certificate for 100 shares.

The Financial Chronicle records show that on April 27,
57 1906, Corn Producers Refining Co. common stock sold as low as $23¼ per share and as high as $23⅞ per share, the average being $23 1/16 per share.

The New York Trust Co., amongst other property, received from Mr. C. H. Matthiessen, as part of securities going to make up the aforementioned trust fund for Erard Matthiessen, 6,000 shares Corn Products Refining Co. common stock bearing certificate number C3868 through C3927 for 100 shares each; these certificates were received on April 27, 1906, in exchange for common stock Corn Products Co.

The trust company had certificates C3868 to C3927 transferred, and received, in name of Erard Matthiessen, certificates C41618 to C41677 in exchange; the latter certificates, 100 shares each Corn Products Refining Co. common stock, were sold by the trust company in 1922 for $603,385.00.

Inasmuch as the New York Trust Co. is unable to corroborate and prove as cost to Mr. C. H. Matthiessen $86 per share, and the trust company has definitely proved to the satisfaction of the Commissioner of Internal Revenue a value of $23 1/16 per share on April 27, 1906, to be used as a basis, I have employed the latter figure as the basic cost in arriving at the taxable profit arising out of the sale of the stock in question, this value being greater than the March 1, 1913, value.

In connection with the nature of the profit I have included the entire profit in net income subject to normal and surtaxes, in accordance with IT-1379 Cumulative Bulletin 1-2, July-Dec. 1922, which

states that section 206 of the Revenue Act of 1921 has no
58 application because the securities have not been held by the trustee for a period of two years prior to the sale.

My revised computation of taxable profit arising out of the sale of the 6,000 shares in question is as follows:

Security sold	Date acquired	Amount recd	Basic cost	3/1/13 value	Net gain
6,000 shares Corn Products Refining Co. common.	Acquired by grantor of trust April 27, 1906.	$603,385	$141,375	$72,750	$462,010

Schedule 2

Computation of tax

1922 (ended 12/31/22)

Total net income (see schedule)		$489,898.73
Income subject to surtax		489,898.73
Less:		
Exemption	$1,000.00	
Dividends	27,201.25	
		28,201.25
Income subject to normal tax		461,697.48
Tax, 4% on $4,000	160.00	
Tax, 8% on $457,697.48	36,615.80	
Surtax	215,909.36	
Total tax		252,685.16
Less: Tax withheld at source	17.50	17.50
Total tax assessable		252,667.66
Tax previously assessed		14,391.71
Additional to be assessed		238,275.95

59 Before United States Board of Tax Appeals

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated April 10, 1933

1. Under the circumstances herein, held that petitioner has not shown that certain stock was not acquired by gift after December 31, 1920, within the meaning of section 202 (a) (2) of the Revenue Act

of 1921. The basis to be used in determining gain or loss upon the sale thereof by the trustee is the cost of such stock to the grantor.

2. Section 202 (a) (2) of the Revenue Act of 1921 is constitutional. (Taft *v.* Bowers, 278 U.S. 470.)

3. Held, petitioner is not entitled to have its tax computed under section 206 of the Revenue Act of 1921, since the property was not held for more than two years.

60 Russell D. Morrill, Esq., and Henry Mannix, Esq., for the petitioner.

Brooks Fullerton, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax for the year 1922 in the amount of $238,275.95.

This Board held that this proceeding should be dismissed for lack of jurisdiction (New York Trust Co., Trustee, 20 B.T.A. 162), and it was dismissed. The United States Circuit Court of Appeals for the Second Circuit reversed the order of the Board (New York Trust Co. *v.* Commissioner, 54 Fed. [2d] 463). Certiorari was denied by the United States Supreme Court (28 U.S. 556). The cause was remanded to the Board for such further proceeding as should be had.

The following errors are alleged: (1) The respondent has erroneously determined petitioner's gross income for the year 1922 in that he has incorrectly computed the profit realized in that year upon the sale of 6,000 shares of the common stock of the Corn Products Refining Company, such profit having been computed by using as a basis the cost of said stock to petitioner's grantor pursuant to the provisions of section 202 (a) (2) of the Revenue Act of 1921, instead of its fair market value on the date it was acquired by petitioner; (2) in so far as section 202 (a) (2) of the Revenue Act of 1921 purports to authorize respondent to tax to petitioner an alleged profit upon the sale of such stock, computed by using as a basis the cost of said stock to petitioner's grantor, said section is un-

61 constitutional and void; (3) in the event the Board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit was correct, then respondent erred in computing the tax upon said profit at the full normal and surtax rates instead of at the rate of 12½ per cent in accordance with section 206 of the Revenue Act of 1921.

Findings of Fact

The petitioner is a corporation, organized under the banking law of the State of New York, and its principal office is at 100 Broadway, New York City.

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375, which cost exceeded the value of such shares on March 1, 1913.

By an irrevocable indenture dated December 24, 1921, Conrad Henry Matthiessen transferred the 6,000 shares of common stock of the Corn Products Refining Company to the petitioner in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time petitioner was directed to pay over all such accumulated income to such son. Thereafter and until Erard A. Matthiessen should attain the age of 25 years, petitioner was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that petitioner should
62 pay over the principal in equal shares to two other sons of the grantor.

On December 24, 1921, the 6,000 shares of common stock of the Corn Products Refining Company had a fair market value of $96.25 per share, or a total fair market value of $577,500.

During the year 1922, the petitioner sold the 6,000 shares of the common stock of the Corn Products Refining Company above referred to, receiving therefor the net amount of $603,385. Petitioner filed a Federal income tax return for the calendar year 1922, wherein it reported a profit of $87,385 on the sale.

In computing the profit realized by petitioner upon this sale, the respondent used as a basis the cost of such stock to Conrad Henry Matthiessen instead of its fair market value as of the date it was acquired by the petitioner. As shown by the notice of deficiency, the respondent treated the transaction whereby Conrad Henry Matthiessen transferred the stock in trust as a gift and computed the profit under article 1562 of Regulations 62, which article deals with property acquired by gift after December 31, 1920.

Erard Matthiessen had not reached the age of 21 during the year 1922.

OPINION

McMahon: We must first determine the proper basis for the computation of gain or loss upon the sale by the petitioner in 1922 of 6,000 shares of common stock of the Corn Products Refining Company which were acquired by petitioner as trustee in 1921.
63 The respondent has held that subdivision (2) of section 202 (a) of the Revenue Act of 1921[1] is here applicable and

[1] SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property, as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. * * *

that the proper basis to be used is the cost of such stock to the donor.

The respondent has held that the irrevocable indenture dated December 24, 1921, accomplished a gift of the 6,000 shares of stock in question. There is no evidence to show that it did not accomplish a gift. On the contrary, it appears that Conrad Henry Matthiessen parted with all dominion over the subject matter. A gift may be made by a transfer in trust where, as here, the grantor relinquishes all dominion over the subject matter. Murray Guggenheim (24 B.T.A. 1181), affirmed by the Supreme Court in Burnet v. Guggenheim (53 S.Ct. 369), which reversed the United States Circuit Court of Appeals decision in Guggenheim v. Commissioner (58 Fed. (2d) 188). See also Bok v. McCaughn (42 Fed. (2d) 616). The petitioner, however, contends that subdivision (2) of section 202 (a), in referring to property "acquired by gift after December 31, 1920", means property acquired by the taxpayer, that the trustee is
64 the taxpayer herein involved, and that since the trustee did not acquire the property by gift, but as trustee, subdivision (2) of section 202 (a) does not apply here. This contention is not well founded. In Security Trust Co. et al., Trustees (25 B.T.A. 29, 38), we stated:

"* * * Here the testator actually created the trust by his will. The trust, not the trustees, is the taxpayer. The trustees are only one of the component parts of the taxpayer. They hold legal title to and possession of the property and act for the taxpayer. They never acquired a beneficial interest in the trust property—that goes to the cestuis que trustent, who are also a part of the trust. * * *" Upon the record before us we cannot hold that under subdivision (2) of section 202 (a) the property in question was not "acquired by gift after December 31, 1920." This view is, we believe, in accord with the purpose of the section of the revenue act in question.

The Ways and Means Committee report and the Finance Committee report upon the Revenue Act of 1921 contain the following discussion of subdivision (2) of section 202 (a):

"* * * An essential change, however, is made in the treatment of property acquired by gift. No explicit rule is found in the present statute for determining the gain derived or the loss sustained on the sale of property acquired by gift; but the Bureau of Internal Revenue holds that under existing law the proper basis is the fair market price or value of such property at the time of its acquisition. This rule has been the source of serious evasion and abuse.
65 Taxpayers having property which has come to be worth far more than it cost to give such property to wives or relatives by whom it may be sold without realizing a gain unless the selling price is in excess of the value of the property at the time of the gift. The proposed bill in paragraph (2) of subdivision (a) provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss shall be the same as the property would have in the hands of

the donor or the last preceding owner by whom it was not acquired by gift. * * *"

In Rice *v.* Eisner (16 Fed. (2d) 358) the following appears:

"The act of 1921 was apparently passed for quite another reason, that is, in the future to prevent donors from escaping the high taxes prevailing by giving property to their wives or children. As the latter would be allowed on any subsequent sales to subtract the value of the gift when they received it, and as a gift was not a sale as regards the donor, all increment escaped taxation which had accrued during the ownership of the donors. As to earlier gifts the rule remained as it had been in practice applied before the act of 1921 was passed."

Francis Francis, Guardian (15 B.T.A. 1332), cited by petitioner, is distinguishable from the instant proceeding. In that case there was clearly no gift of the property involved after December 31, 1920, so as to render section 202 (a) (2) of the Revenue Act of 1921 applicable. The taxpayers there acquired the property "pur-
66 suant to a vested legal right and this right had been theirs since long before the adoption of the Sixteenth Amendment in 1913."

Bankers Trust Co., Trustee (24 B.T.A. 10), cited by petitioner, is also distinguishable. There the beneficiaries, under the indenture, "took absolutely nothing until the grantor's death, and even then would receive nothing in case their deaths occurred prior to his. The final reversionary interest was to the grantor's estate." We there held that there was no gift inter vivos.

Subdivision (2) of section 202 (a) of the Revenue Act of 1921 provides that the basis of the property shall be the same as that which it would have in the hands of the donor. The stock herein involved was acquired by the donor in 1906 at a cost of $141,375, which amount exceeded the value of such stock on March 1, 1913. Under subdivision (b) of section 202 of the Revenue Act of 1921, set forth in the margin,[2] the basis in the donor's hands would be the
67 cost to him. We hold, therefore, that the basis to be used in the computation of gain derived by the petitioner upon the sale of the stock in question is $141,375.

The contention of the petitioner that section 202 (a) (2) is unconstitutional is without merit. (Taft *v.* Bowers, 278 U.S. 470, and Cooper *v.* United States, 280 U.S. 409.)

---

[2] SEC. 202. (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or values as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

The petitioner also contends that in the event the Board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit is correct, then respondent erred in computing the tax upon such property at the full normal and surtax rates instead of at the rate of 12½ per cent in accordance with section 206 of the Revenue Act of 1921.[3] However, following the decisions in Magdaline McKinney (16 B.T.A. 804); William Kempton Johnson (17 B.T.A. 611); affd., Johnson *v.* Commissioner (52 Fed. (2d) 726); and Sydney M. Shoenberg (19 B.T.A. 399); affd., Shoenberg *v.* Burnet (55 Fed. (2d) 543), we hold that petitioner is not entitled to have its tax computed under section 206 of the Revenue Act of 1921, since the property in question was not held by the taxpayer for more than two years.

Reviewed by the Board.

Decision will be entered for the respondent.

68 Before United States Board of Tax Appeals, Washington

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, company petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated April 10, 1933, it is

Ordered and Decided: That there is a deficiency of $238,275.95 for the year 1922.

[SEAL] (Signed) STEPHEN J. McMAHON,
Member.

Enter:

Entered Apr. 11, 1933.

---

[3] SEC. 206. (a) That for the purpose of this title:

* * * * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business). * * *

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. * * *

69 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed June 28, 1933

To the honorable judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes petitioner-petitioner on review by its attorney, Russell D. Morrill, and respectfully shows:

I

Petitioner on review (hereinafter referred to as the "Taxpayer") is a corporation, organized under the banking law of the State of New York, and its principal office is at 100 Broadway, New
70 York City, New York. The Taxpayer, as trustee, etc., duly filed its Federal income-tax return for the year 1922 with the collector of internal revenue for the second district of New York, whose office is located in the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

Respondent on review (hereinafter referred to as the "Commissioner") is the duly authorized and acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States.

II

The controversy relates to an alleged deficiency of $238,275.95 in income tax for the calendar year 1922, determined by the Commissioner. The issues are: (a) the proper cost basis of certain stock sold by the Taxpayer in 1922, and (b) in the alternative, whether profit derived from the sale of said stock is taxable at the normal and surtax rates, or represents a capital profit derived from property "held" for more than two years and is taxable at the capital gain rate of 12½%.

The facts are:

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375, which cost exceeded the value of such shares on March 1, 1913.

By an irrevocable indenture dated December 24, 1921, Conrad Henry Matthiessen transferred the 6,000 shares of common stock of the Corn Products Refining Company to the Taxpayer
71 in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time the Taxpayer was directed to pay over all such accumulated income to such son. Thereafter and until Erard A. Matthiessen should attain the

age of 25 years, the Taxpayer was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that the Taxpayer should pay over the principal in equal shares to two other sons of the grantor. Erard A. Matthiessen had not reached the age of 21 during the year 1922.

On December 24, 1921, the 6,000 shares of common stock of the Corn Products Refining Company had a fair market value of $96.25 per share, or a total fair market value of $577,500.

During the year 1922, the Taxpayer sold the 6,000 shares of the common stock of the Corn Products Refining Company above referred to, receiving therefor the net amount of $603,385. The Taxpayer filed a Federal income-tax return for the calendar year 1922, wherein it reported a profit of $87,385 on the sale.

Upon review, in computing the profit realized by the Taxpayer upon this sale, the Commissioner used as a basis the cost of such stock to Conrad Henry Matthiessen, or $141,375, relying on section 202 (a) (2) of the Revenue Act of 1921 which requires a donee to use the same basis as the donor, and computed the tax at the
72 normal and surtax rates. Such adjustment by the Commissioner produced the alleged deficiency of $238,275.95. The Board of Tax Appeals sustained the Commissioner.

The Taxpayer contends that in determining its cost basis, section 202 (a) (2) of the 1921 Revenue Act is not applicable, and that its cost basis is value of the stock at the date acquired, or $577,500. In the alternative, the Taxpayer contends that if its cost basis is the same as that of Conrad Henry Matthiessen then it "held" such stock, within the meaning of section 206 (a) (6) of the 1921 Revenue Act, for more than two years, and, therefore, the profit derived from its sale is subject to tax at the capital gain rate of 12½%.

III

The assignments of error are:

1. The Board of Tax Appeals erred in finding and holding that section 202 (a) (2) of the Revenue Act of 1921 is applicable, and that the Taxpayer's cost basis for the 6,000 shares of common stock of Corn Products Refining Company acquired from Conrad Henry Matthiessen upon the creation of the trust was the same as the cost basis thereof to said Conrad Henry Matthiessen.

2. The Board of Tax Appeals erred in failing to find and hold that the Taxpayer's cost basis for said stock was value at the time acquired by the Taxpayer, or $577,500.

3. The Board of Tax Appeals erred in finding and holding
73 that profit derived by the Taxpayer from the sale of said stock was taxable at normal and surtax rates, and was not taxable at the capital gain rate of 12½%.

4. The Board of Tax Appeals erred in failing to find and hold that the Taxpayer had "held" such stock for more than two years,

within the meaning of section 206 (a), (6) of the 1921 Revenue Act, and that profit derived from the sale thereof was taxable at the capital gain rate of 12½%.

5. The Board of Tax Appeals erred in finding and holding that there is a deficiency for the year 1922 of $238,275.95.

6. The Board of Tax Appeals erred in failing to find and hold that, calculating profit on the basis of value at the time acquired, the Taxpayer is entitled to a refund for the year 1922 of $6,677.71.

7. In the alternative, the Board of Tax Appeals erred in failing to find and hold that, taxing the profit determined by the Commissioner at the capital gain rate, there is a deficiency for the year 1922 of $44,529.80.

IV

Wherefore, the Taxpayer petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, and that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of the said court for filing, and that appropriate action be taken to the end that the errors complained
74 of may be reviewed and corrected by said court, and that the decision, judgment, and order of the Board of Tax Appeals be reversed.

Respectfully submitted.

RUSSELL D. MORRILL.
Attorney for Petitioner on Review.
14 Wall Street, New York City, New York.

WHITE & CASE, ESQS.,
14 Wall Street, New York, N.Y.,
Of Counsel.

[*Duly sworn to by Russell D. Morrill; jurat omitted in printing.*]

75 Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing petition for review

Filed July 1, 1933

To E. BARRETT PRETTYMAN, ESQ.,
General Counsel,
Bureau of Internal Revenue,
Internal Revenue Building, Washington, D.C.

SIR: You are hereby notified that the petitioner-petitioner on review on the 28th day of June 1933, filed with the clerk of the United States Board of Tax Appeals, Washington, D.C., a
76 petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board

heretofore rendered in the above-entitled cause on April 11th, 1933. Two copies of the petition for review and assignments of error as filed are hereto attached and served upon you.

Dated at New York City, New York, this 28th day of June 1933.

RUSSELL D. MORRILL,
Attorney for Petitioner on Review,
14 Wall Street, New York City, N.Y.

Personal service of the above and foregoing notice, together with two copies of petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of June 1933.

(Sgd.) E. BARRETT & PRETTYMAN,
Attorney for Respondent on Review.

77 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for record

Filed June 29, 1933

To the Clerk of the United States Board of Tax Appeals:

SIR: You will please prepare, transmit, and deliver to the United States Circuit Court of Appeals for the Second Circuit copies, duly certified as correct, of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit heretofore filed by the petitioner-petitioner on review.

78 1. Docket entries of the proceedings before the Board.
2. Petition, with all exhibits thereto.
3. Answer.
4. Amended answer.
5. Transcript of hearing, had December 9, 1929.
6. Petitioner's exhibit 3.
7. Respondent's exhibit A.
8. Findings of fact and opinion of the Board, promulgated April 10, 1933.
9. Decision of the Board, entered April 11, 1933.
10. Petition for review, together with proof of service of notice of filing petition for review and service of two copies of petition for review.
11. This praecipe.

(Signed) RUSSELL D. MORRILL,
Attorney for Petitioner on Review,
14 Wall Street, New York City, N.Y.

Dated, June 28, 1933.

79 [Clerk's certificate to foregoing transcript omitted in printing.].

80 In United States Circuit Court of Appeals for the Second Circuit

No. 19. October term, 1933

Argued November 23, 1933. Decided December 18, 1933

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, Dated December 24, 1921, by and between Conrad Henry Matthiessen and Said The New York Trust Company, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.

Before MANTON, L. HAND, and SWAN, Circuit Judges.

Petition to review an order of the Board of Tax Appeals fixing a deficiency in the petitioner's income taxes for the year 1922.

J. Du Pratt White, of New York City, for petitioner.

Helen R. Carloss, of Washington, D.C., for respondent.

Opinion

L. HAND, Circuit Judge.

One, Matthiessen, in order to make a settlement for his son, transferred six thousand shares of stock to the petitioner in trust to accumulate the income and pay the accumulations to the son when he became twenty-one, thereafter to pay him the income yearly until he became twenty-five, and at that time to transfer the shares to him. If the son died under twenty-five, the trustee was to transfer the shares to two other sons, share and share alike. Matthiessen bought the shares in 1906, for $141,375; when he transferred them to the trustee, on December 24, 1921, they were worth $577,600. The petitioner by virtue of its powers under the deed sold the shares in 1922 for $603,832. The questions arising are two: whether in estimating the "basis" upon which to calculate profits, the date of Matthiessen's purchase should be taken, or the date of the settlement; and whether, in case the first is the proper date, the tax is limited to twelve and a half percent. under section 206 (a) (6) and section 206 (b) of the Revenue Act of 1921 (42 Stat. 232). The Board held against the petitioner upon both points.

Section 202 (a) (2) of the act (42 Stat. 229) provided that when property was "acquired by gift", the "basis" in estimating profits was to be the cost or value when the donor acquired it. This was held constitutional in Taft *v.* Bowers (278 U.S. 470, 49 S.Ct. 199; 73 L.Ed. 460; 64 A.L.R. 362). And as the settlement was made after the act of 1921 was passed, the only question is as to the meaning of the statute. Was the transfer a "gift"? It was certainly not a "purchase", except in the archaic sense that all transfers of land, not by descent, were purchases. Colloquially perhaps, it was

a gift to the son, who alone got the benefit. Even so, it was nevertheless a gift; the transaction as a whole could not be less, though the trustee's part in it were regarded as only instrumental. Verbally all the conditions specified in section 202 (a) (2) existed; there was a gift and a donor, all that the section required. Again, its underlying purpose was to reach the appreciation which occurred in the hands of the donor, and which could not be taxed in any other way, for he had not "realized" it. That purpose demanded that such a transaction as this be included. So it seems to us immaterial upon whom the tax impinged: upon the trustee, the beneficiary, or
81 the "trust", though we do not read Anderson v. Wilson (289 U.S. 20; 53 S.Ct. 417; 77 L.Ed. 1004), as holding that a new entity has been conceived to bear taxation. Section 219 of the act (44 Stat. 246) imposes the burden either upon the trustee or the beneficiary, never upon the trust; so far as we can see, it speaks in the customary tongue. There was much more to be said for the taxpayer in Burnet v. Guggenheim (288 U.S. 280; 53 S.Ct. 369; 77 L.Ed. 748), where the cancellation of a power to revoke was held to be a "transfer by gift." That ruling could not have been made if trust settlements were not gifts: the settlor had transferred the property to a trustee, and the cancellation did no more than make absolute the trustee's title and the beneficiaries' interests. Finally, it is of no moment that in 1924 Congress amended the law by an express provision including "transfers in trust." Section 204 (a) (3), Revenue Act 1924 (26 U.S.C.A., § 935 (a) (3)) and note. If any inference from this is justified at all, it is rather that the amendment was a definition of earlier purpose than a new enactment. The Board was plainly right on the first point.

More is to be said for the taxpayer on the second, in spite of the fact that two circuits have ruled against him already. Johnson v. Commissioner (52 F. (2d) 726 (C.C.C.A. 3)); Shoenberg v. Burnet (60 App. D.C. 381; 55 F. (2d) 543). True, the trustee, the taxpayer, did not "hold" the property for two years in the usual sense. Moreover, it must be owned that section 206 (c) Revenue Act 1921 (42 Stat. 232), is a statute of exemption, and that as such doubts must be resolved against the taxpayer. (Hoge v. R.R. Co. (99 U.S. 348, 355; 25 L.Ed. 303); Bank of Commerce v. Tennessee (161 U.S. 134, 146; 16 S.Ct. 456; 40 L.Ed. 645); Heiner v. Colonial Trust Co. (275 U.S. 232, 235; 48 S.Ct. 65; 72 L.Ed. 256); Insurance, etc., Co. v. Commissioner (36 F. (2d) 842 (C.C.A. 2)).) Yet the result seems to us an extremely improbable one for Congress to have intended; it could hardly have survived direct scrutiny, had that been given it; it did not indeed survive after 1926. Section 208 (a) (8), Revenue Act 1926 (26 U.S.C.A. § 939) note. The upshot of the two sections, read as the Board reads them, is to treat the donee, for the purpose of computing his income, as holding the property during the period of the donor's tenure; but for the purpose of finding the rate at which

that very income is to be taxed, as holding it only from the time when he gets it. The periods are tacked to establish his "capital assets," and divorced to tax them; he gets all the burdens and none of the benefits; and while it is of course theoretically possible that Congress meant to do this, it is hardly more. We do not think that we do too much violence to the word by so declaring. Though the donee has not literally "held" the property for two years, he is treated as though he had; his acceptance of the gift is regarded as a vicarious substitution of himself for the donor. Only so can he become subject to a tax upon the whole appreciation "realized" by his sale, part of which is otherwise wholly foreign to him. All we have to do is to carry over that substitution into section 206 (a) (6); that is, to read the two sections together. In so doing we merely carry forward and make comprehensive the purpose of section 206 (c) itself, which was to avoid the "freezing" of property because of high surtaxes. (Report of Ways & Means Com. on House Rep. 8425, House Rep. 350, 67th Congress, first session, p. 10.) The classic instance of such a treatment of a statute is Holy Trinity Church v. United States (143 U.S. 457; 12 S.Ct. 511; 36 L.Ed. 226). We do not forget that courts must not make law, but only declare it; but there is no vade mecum to guide us between a sterile literalism which loses sight of the forest for the trees, and a proper scruple against imputing meanings for which the words give no warrant. That there comes a point at which we must be content to treat the purpose as ineffectively expressed, we readily agree, though no one can fix it a priori. But that does not absolve us in a given case, and here we find no sufficient obstacle in the language used; rather we think the generative purpose can infuse it.

Order reversed; deficiency to be taxed upon the income, as determined below, but at the rate prescribed by section 206 (c) of the Revenue Act of 1921.

MANTON, Circuit Judge, dissenting in opinion.

82 In United States Circuit Court of Appeals for the Second Circuit.

No. 119. October Term, 1933

Argued November 23, 1933. Decided December 18, 1933

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, Dated December 24, 1921, by and between Conrad Henry Matthiessen and Said The New York Trust Company, petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Appeal from the United States Board of Tax Appeals.

Before MANTON, L. HAND, and SWAN, Circuit Judges.

Dissenting opinion

MANTON, Circuit Judge (dissenting).

I dissent from that part of the opinion which accords to the appellant the benefits of section 206 (a) (6) and 206 (b) of the Revenue Act 1921. The conclusion reached is that, if the basis for determining the gain from the sale of stock is the cost to the donor, the appellant should be classified as one acquiring and holding for profit or investment, for more than two years the trust res and therefore entitled to be taxed on the capital net gain under the provisions of section 206 (b). But, however desirable it might be to grant relief to the taxpayer, still the statute requires the property to be held by it for more than two years. The trust is the taxpayer, and it had not held the property for more than two years. (Anderson v. Wilson (289 U.S. 20; 53 S.Ct. 417; 77 L.Ed. 1004). This statute is so clear in its terms that there is no room for interpretation, and the courts may not create a new statute by interpretation. (Caminetti v. United States (242 U.S. 470; 37 S.Ct. 192; 61 L.Ed. 442; L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168); Hyde v. Shine (199 U.S. 62, 78; 25 S.Ct. 760; 50 L.Ed. 90); Lake County v. Rollins (130 U.S. 662, 670; 9 S.Ct. 651; 32 L.Ed. 1060; Ruggles v. Illinois (108 U.S. 526; 2 S.Ct. 832; 27 L. Ed. 812).)

As stated in the prevailing opinion, a different result was reached in Schoenberg v. Burnet, 60 App.D.C. 381, 55 F. (2d) 543, and Johnson v. Commissioner (52 F. (2d) 726 (C.C.A. 3)). No regulation of the collector has been made to the contrary to this construction of the statute. See article 1651, Reg. 62, 65. This administrative interpretation has the force and effect of law in view of the fact that Congress included the same definition of capital assets in the Revenue Act of 1924, § 208 (26 U.S.C.A., § 939, note).

Moreover, the change in the law by section 208 of the Revenue Act of 1926 (44 Stat. 9, 19, 20; (26 U.S.C.A., § 939, note), which gave the donee the right to add the period during which the property was held by the donor to the period of his ownership in measuring the two-year period, was not declaratory of existing law. It was a desire on the part of Congress to change the law. (United States v. Magnolia Petroleum Co., 276 U.S. 160; 48 S.Ct. 236; 72 L.Ed. 509.) (See House Reports No. 1, 69th Congress, 1st session, by Committee of Ways and Means, pp. 6, 7.) Congress could have had no purpose in enacting existing regulations into the law. It was not engaged in clarifying, but rather in changing, the law. The order should be affirmed.

83 In United States Circuit Court of Appeals, Second Circuit

NEW YORK TRUST COMPANY, AS TRUSTEE, ETC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed Dec. 26, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed and cause remanded with directions to enter an order in accordance with the opinion of this court.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

[File endorsement omitted.]

84 [File endorsement omitted.]

85 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1934

45 SUPREME COURT OF THE UNITED STATES

No. 873. October term, 1933

Order allowing certiorari

Filed April 9, 1934.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

46 Supreme Court of the United States

No. 899. October term, 1933

Order allowing certiorari

Filed April 9, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Appendix	7

CITATIONS

Cases:	
Anderson v. *Wilson*, 289 U.S. 20	5
Brewster v. *Gage*, 280 U.S. 327	4
Commissioner v. *New York Trust Company*, 54 F. (2d) 463, certiorari denied, 285 U.S. 556	
Hyde v. *Shine*, 199 U.S. 62	5
Johnson v. *Commissioner*, 52 F. (2d) 726	4
McKinney v. *Commissioner*, 16 B.T.A. 804	5
Ruggles v. *Illinois*, 108 U.S. 526	5
Russell v. *United States*, 278 U.S. 181	5
Shoenberg v. *Commissioner*, 55 F. (2d) 543	4
Statutes:	
Revenue Act of 1921, c. 136, 42 Stat. 227, 232	
Sec. 2 (9)	7
Sec. 206	7
Revenue Act of 1924, c. 234, 43 Stat. 253, sec. 208 (U.S.C., Title 26, sec. 939)	4
Revenue Act of 1926, c. 27, 44 Stat. 9, sec. 208 (U.S.C. App., Title 26, sec. 939)	5
Miscellaneous:	
I.T. 1660, II-1 Cumulative Bulletin 36	4
I.T. 1889, III-1 Cumulative Bulletin 70	4
House Report No. 1, 69th Cong., 1st sess., pp. 6-7	5
Senate Report No. 52, 69th Cong., 1st sess., p. 18	6

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the cause between the above parties on December 26, 1933, with one judge dissenting, reversing an order of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 59–67)[1] is reported in 27 B.T.A. 1127. The majority

[1] The record references herein are to the record as printed in the Circuit Court of Appeals.

and dissenting opinions of the Circuit Court of Appeals are reported in 68 F. (2d) 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where property which was purchased in 1906 was given to a trustee in 1921 and sold by the trustee in 1922 is the gain on the sale taxable as a capital net gain under Section 206 of the Revenue Act of 1921, which defines "capital assets" as assets which have been held by "the taxpayer" for more than two years?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The facts found by the Board of Tax Appeals (R. 61–62) may be summarized as follows: [2]

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the

[2] The Board of Tax Appeals originally dismissed this proceeding for lack of jurisdiction (20 B.T.A. 162), but on the Government's appeal this order was reversed and the case was remanded for hearing on the merits. *Commissioner* v. *New York Trust Company*, 54 F. (2d) 463, certiorari denied, 285 U.S. 556.

Corn Products Refining Company at a cost of $141,375. This cost exceeded the fair market value of the stock on March 1, 1913. (R. 61.)

By an irrevocable deed of trust, dated December 24, 1921, Matthiessen transferred this stock to the present respondent in trust for his son, Erard A. Matthiessen, with remainders over in case of the death of the son. (R. 61–62.) On December 24, 1921, when the trust was created, the shares of stock had a total fair market value of $577,500. (R. 62.)

During the year 1922, the respondent sold the 6,000 shares of the common stock of the Corn Products Refining Company, which it held as trustee, for $603,385. (R. 62.)

In computing the profit realized by the respondent upon this sale, the Commissioner of Internal Revenue used as a basis the cost of the stock to Conrad Henry Matthiessen instead of its fair market value as of the date it was acquired by the respondent, and determined that this gain was not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra*, p. 7). On appeal to the Circuit Court of Appeals, that court, with one judge dissenting, sustained the Commissioner's determination as to the proper basis for computing the amount of the gain, but concluded that the gain was taxable as a capital net gain and not as ordinary income.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the gain from the sale of the stock by the respondent in 1922 was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921.

2. The Circuit Court of Appeals erred in holding that the gain from the sale of the stock by the respondent in 1922 was not taxable as ordinary income.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Johnson* v. *Commissioner*, 52 F. (2d) 726, and with the decision of the Court of Appeals of the District of Columbia in *Shoenberg* v. *Commissioner*, 55 F. (2d) 543. This conflict is recognized by the court below in its opinion. The decision is also in conflict with the consistent position of the Bureau of Internal Revenue (see I.T. 1660, II–1 Cumulative Bulletin 36; I.T. 1889, III–1 Cumulative Bulletin 70),[3] and with the decision of

[3] Following this administrative interpretation, Congress reenacted the statutory provisions in question in Section 208 of the Revenue Act of 1924 (U.S.C., Title 26, Sec. 939). The principle of *Brewster* v. *Gage*, 280 U.S. 327, and similar cases is, therefore, applicable.

the Board of Tax Appeals in *McKinney* v. *Commissioner*, 16 B.T.A. 804, and in the two cases above cited, in which the Board's decision was affirmed on appeal.

2. The decision below is erroneous. Section 206 of the Revenue Act of 1921 (*infra*, p. 7) provides for the taxation of gains from the sales of capital assets at 12½% instead of at the ordinary rates, and defines the term "capital assets" as

> property acquired and held by the taxpayer for profit or investment for more than two years * * *.

The statute plainly requires that the benefit of the lower rate applicable to capital gains cannot be taken unless "the taxpayer" has held the property for two years. In the present case the taxpayer was the trustee (*Anderson* v. *Wilson*, 289 U.S. 20); it had not held the property for two years at the time of the sale, and Section 206 does not apply. The language of the statute being clear and specific, there is no room for interpretation. *Ruggles* v. *Illinois*, 108 U.S. 526, 534; *Hyde* v. *Shine*, 199 U.S. 62, 78.

The law has subsequently been changed. Section 208 of the Revenue Act of 1926. But this change in the 1926 Act "can not authorize construction of the earlier one not consonant with the language there employed." *Russell* v. *United States*, 278 U.S. 181, 188. Moreover, the committee reports with respect to the 1926 Act indicate the intention to change the law. House Report No. 1,

69th Cong., 1st Sess., pp. 6–7; Senate Report No. 52, 69th Cong., 1st Sess., p. 18.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 232

SEC. 2. (9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

* * * * *

SEC. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

* * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and

in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

U.S. GOVERNMENT PRINTING OFFICE: 1934

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

AGAINST

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

We respectfully submit that the petition for certiorari filed by the Solicitor General should not be granted because, except for the instant proceeding, the question is academic, and because the decision of the Circuit Court is correct.

I.

Petitioner's application for certiorari involves the question whether the Supreme Court should review a dead issue solely to resolve a conflict between Circuits.

The capital gain provisions were first adopted with the Revenue Act of 1921, c. 136, 42 Stat. 232, 233. So far as material here, these provisions were continued in the same form in Section 208 of the Revenue Act of 1924, c. 234, 43 Stat. 262, 263. An express provision was adopted in the Revenue Act of 1926, c. 27, 44 Stat. 19, 20, obviating the question.* The 1926 Act was applicable to the year 1925 [Sec. 200(a)]. The quoted provision of the 1926 Act has been continued in the 1928 and 1932 Acts [Sec. 101(c) (8)]. Thus, the question involved could arise only with respect to income for the years 1921 to 1924.

---

* "In determining the period for which the taxpayer has held property received on an exchange, there shall be included the period for which he held the property exchanged, if under the provisions of Section 204 the property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged. *In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of Section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.* In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of subdivision (c) of Section 203 of this Act, or of the Revenue Act of 1924, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution." (Italics ours)

It will be noted that the Petitioner does not claim the case presents an important question of general or federal law which has not been but should be settled by this Court. Diligent search and inquiry indicate that this is the only pending case involving the issue, and we understand this to be so. If our understanding is incorrect, we would be glad to have the Solicitor General inform the Court as to the facts in that respect.

Under such circumstances, we submit there is no good reason for this Court to grant the petition. Far from having any general application, the effect of this Court's decision would be limited to the instant proceeding. Presumably, the principal justification for certiorari where there is a conflict between Circuits is to avoid a situation provocative of litigation. Where, as here, a dead issue is involved, we submit that the conflict loses its significance and the application should be disposed of as though no conflict existed.

II.

The decision below is correct. It carries out the purpose of the statute (*Burnet* v. *Harmel*, 287 U. S. 103, 106) and is consistent with the interpretation in *Taft* v. *Bowers*, 278 U. S. 470, 482, 483, of the donor's basis provision.*

The failure of Congress specifically to disapprove of the contrary interpretation of the Treasury Department (I. T. 1660, II-1 C. B. 36; I. T. 1889, III-1 C. B. 70), when

---

* "In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift." Sec. 202 (a) (2) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229.

adopting the succeeding Revenue Act (Act of 1924) is of little significance standing alone, and loses all point in the light of the Committee Reports recommending changes in the next succeeding Revenue Act (Act of 1926).* Such Reports plainly indicate that both as to exchanges (with respect to which the statute approved the Treasury's Regulations) and as to gifts the enlargement of the 1926 Act was intended to be interpretative.

We submit that the construction claimed by the Petitioner is, as expressed in the prevailing opinion below, dependent upon "a sterile literalism which loses sight

---

* The House Ways & Means Committee and the Senate Finance Committee Reports (H. R. Report No. 1 and Senate Report No. 52, 69th Congress, First Session) both contain the following statement:

> "Section 208(a) (8). *The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years.* Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact *the question frequently arises* as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section *incorporates in the law the present regulation of the Treasury* and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. *The same question arises in the case of property received by gift after December 31, 1920.* The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section." (Italics ours)

of the forest for the trees." In *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462, 470, this Court evidenced its disapproval of such an approach.

Conclusion.

Under the circumstances, the conflict in decision of the Circuit Courts of Appeals affords no substantial reason for certiorari. The decision of the court below was correct. The petition should be denied.

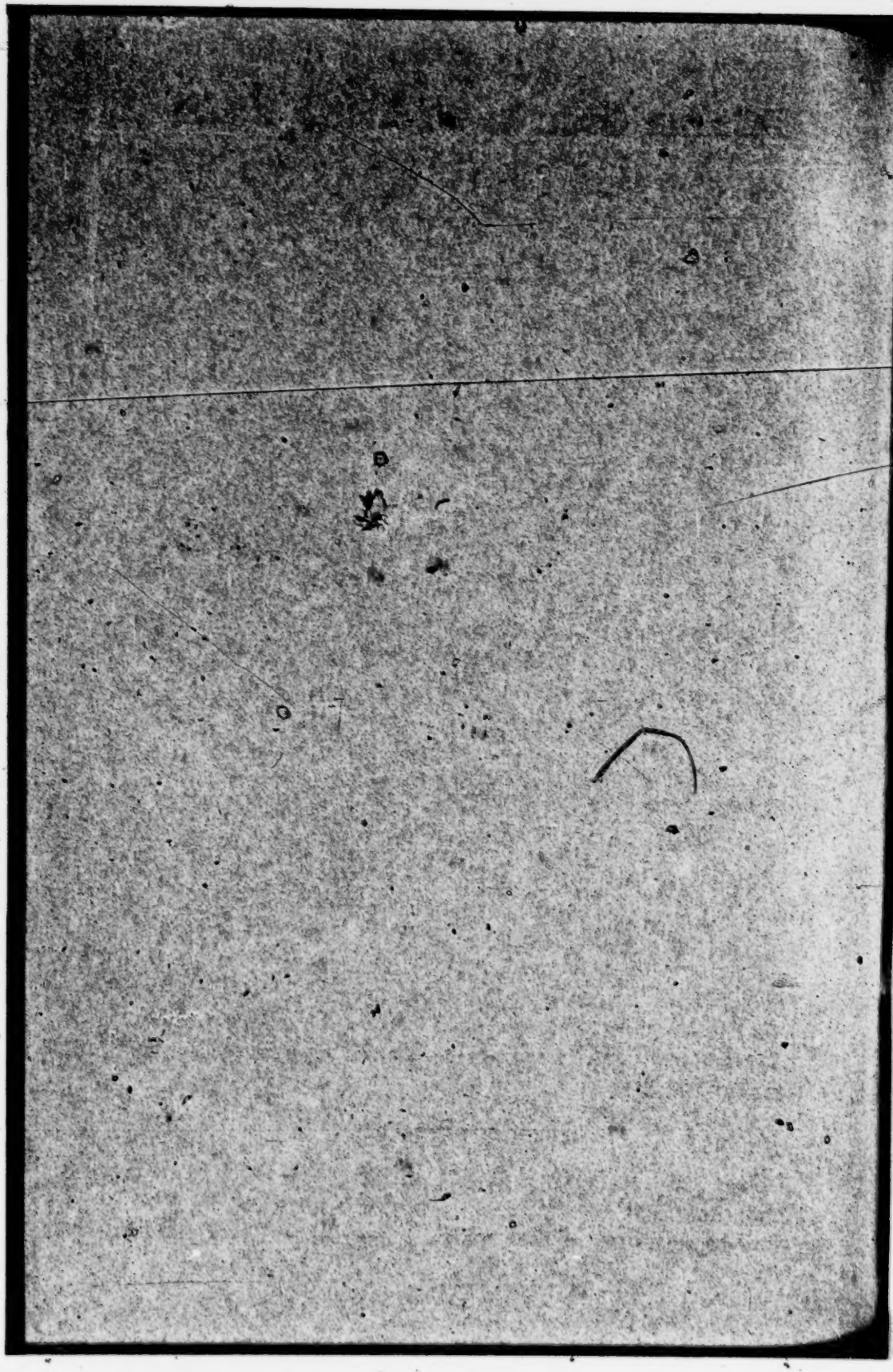
If, however, the petition is granted, the cross-petition filed by Respondent likewise should be granted.

Respectfully submitted,

J. Du Pratt White,
Counsel for Respondent.

March 1934.

2912—F



IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

AGAINST

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Respondent.

RESPONDENT'S CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Solicitor General, on behalf of the Commissioner of Internal Revenue, has petitioned for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered December 26, 1933. Respondent has filed a brief in opposition.

Respondent prays, however, that if a writ of certiorari is granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition.

If the Solicitor General's petition is denied, Respondent does not pray that a writ of certiorari be granted on this cross-petition.

Question Presented

Does Section 202(a) (2) of the Revenue Act of 1921, providing that the basis of "property acquired by gift" shall be the same as that which it would have in the hands

of the donor, apply where a trustee in 1922 sold corporate stock acquired in 1921 from the grantor upon the creation of the trust?

Statutes Involved

The Statutes involved are set forth in the Appendix, *infra*, pages 5, 6.

Statement

In 1906 Conrad Henry Matthiessen acquired 6,000 shares of common stock of Corn Products Refining Company for $141,375 (R. 61). In 1921 Matthiessen transferred the stock to Respondent as trustee for the grantor's son, Erard A. Matthiessen, with remainders over in case of the death of said son (R. 61). When the trust was created the stock was worth $577,500 (R. 62). In 1922 the trustee, by virtue of its powers under the trust deed, sold the stock for $603,385 (R. 62).

The Commissioner, in computing profit realized on the sale, used as a basis the grantor's cost, relying on Section 202(a) (2) of the 1921 Act, and determined that the gain was not taxable, under Section 206 of that Act, as a capital gain from property "held" for over two years. The Board of Tax Appeals sustained the Commissioner. The Circuit Court sustained the Board as to basis, but, one judge dissenting, reversed its decision as to capital gain.

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the gain should be computed on the basis of cost of the stock to the grantor.

2. The Circuit Court of Appeals erred in failing to hold that the gain should be computed on the basis of the value of the stock at the time transferred in trust.

Reasons for Granting the Writ

1. One issue, the capital gain question, was decided by the Circuit Court in favor of the taxpayer; one issue, the cost basis question, was decided in favor of the Commissioner. If the writ prayed for by the Solicitor General to review the capital gain question is granted, we respectfully submit the whole case should be reviewed by the Court, including the issue as to cost basis, decided against the taxpayer.

If the Circuit Court's decision as to capital gain should be reversed and this Court did not consider the question as to basis, the result would be exceedingly harsh. If the grantor had sold the stock and put the proceeds in trust, thereby arriving at the same result as that accomplished, the grantor would have paid a maximum tax on the transaction of about $57,000.* The Solicitor General seeks to establish a tax against the trustee with respect to the sale of $251,497.40,** more than fifty per cent. of the appreciation realized after holding the stock for sixteen years. We submit every opportunity should be afforded the taxpayer to question such a result.

2. The decision below as to cost basis is erroneous. Section 202(a) (2) applies only where the "property" sold was acquired by the taxpayer "by gift." Here the "property" was trust corpus and the taxpayer is the trustee. *Anderson* v. *Wilson*, 289 U. S. 20. The phrase "by gift" characterizes the *acquisition*, and the taxpayer must be a donee before the statute can be invoked. A trustee is not a donee any more than is a custodian or a bailee. While the grantor may have made a "gift,"

*12½% of $462,010. (the difference between $141,375, cost to grantor, and $603,385, selling price).

**The difference between the tax payable excluding this transaction and the tax payable including this transaction as ordinary gain. (See R. 54, 58.)

and therefore the transaction could have been taxed as a "gift," *Commissioner* v. *Guggenheim*, 288 U. S. 280, the donees were the life tenant and the remaindermen, who are taxpayers separate and distinct from the trustee. *Anderson* v. *Wilson, supra.* Had they sold their interests, there would have been a very different question.

Congress did not intend the gift basis provision to apply to sales by trustees. This is evidenced by the insertion of a specific and separate provision as to trusts in the Revenue Act of 1924 (see Appendix, *infra*, pp. 5, 6), and the Committee reports recommending this provision.* In all subsequent Revenue Acts the distinction between gifts and trusts for purposes of basis has been carefully preserved.**

If Section 202(a). (2) is not applicable, the proper basis is value at the time the stock was transferred in trust. *Heiner* v. *Tindle*, 276 U. S. 582; *Rice* v. *Eisner*, (C. C. A. 2) 16 F. (2) 358.

WHEREFORE, it is respectfully prayed that if a writ of certiorari is granted on the petition of the Solicitor General, but not otherwise, a writ of certiorari be granted on this cross-petition.

Respectfully submitted,

J. DU PRATT WHITE,
Counsel for Respondent
(Petitioner on Cross-Petition).

March 1934

---

* House Ways and Means Committee Report, dated February 11, 1924, p. 16, accompanying H. R. 6715. Senate Finance Committee Report, dated April 10, 1924, p. 17, accompanying H. R. 6715.

** See 1926 Act, Sec. 204(a) (2), (3) and (4); 1928 Act, Sec. 113(a) (2), (3) and (4); 1932 Act, Sec. 113(a) (2), (3) and (4).

Appendix

Revenue Act of 1921; c. 136, 42 Stat. 229.

Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

Revenue Act of 1924; c. 234, 43 Stat. 258.

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913 shall be the cost of such property; except that—

* * * * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last pre-

ceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made. The provisions of this paragraph shall not apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921 or in subdivision (c), (d) or (f) of section 302 of this Act;

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition.

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 899

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition in this case, if the petition in No. 873, *Helvering* v. *New York Trust Co.*, is granted.

The present respondent has filed a petition for writ of certiorari in this case to review the decision of the court below insofar as it held that the gain on the sale in 1922 by a trustee of property purchased by the donor in 1906 and given to the trustee

49121—34

in 1921, was taxable as a capital net gain under Section 206 of the Revenue Act of 1921, which defines "capital assets" as assets which have been held by "the taxpayer" for more than two years.

In the present petition the trustee contends that Section 202 (a) (2) of the Revenue Act of 1921, providing that the basis for ascertaining the amount of the gain or the loss upon the sale of "property acquired by gift" shall be the same as that which it would be in the hands of the donor, does not apply to the sale in 1922, and that the trustee as "the taxpayer" should therefore take as its basis the value of the property upon the date of the gift to it.

The question raised in the taxpayer's petition is so closely related to that presented in the Commissioner's petition that it may be helpful to the Court to take jurisdiction of the entire controversy, if it is to consider any part of it. Therefore, although we believe the decision below was correct on the point raised in the present petition, we do not oppose the granting of the writ.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 899

THE NEW YORK TRUST COMPANY, AS TRUSTEE Under Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER

The question raised on the taxpayer's petition is the applicability of Section 202 (a) (2) of the Revenue Act of 1921 to the acquisition by the trustee on December 24, 1921, of the stock involved in this case. That Section is applicable to "property, acquired by gift after December 31, 1920, * * *." The trustee contends that this pro-

56388—34

vision does not cover gratuitous transfers in trust, and relies strongly on the fact that Congress in enacting the Revenue Act of 1924, added a provision to that Act (Section 204 (a) (3)) specifically relating to transfers in trust.

In our principal brief we have contended that Section 202(a)(2) of the 1921 Act is applicable to gifts in trust as well as to gifts direct. In support of this contention we have pointed out the contemporaneous and long-continued administrative construction of the statute to this effect; and we have argued that because of the language of the statute and this administrative construction, the change in the 1924 Act must be regarded as an explicit acceptance by Congress of the construction of the existing law in order to remove any possible doubt as to the correctness of that construction.

In addition to the arguments on this point in our main brief, we wish to call the attention of the Court to another consideration which seems to be very persuasive in leading to the conclusion that in enacting Section 204(a)(3) of the Revenue Act of 1924, Congress did not consider that it was enacting for the future a rule different from that which had been in effect under the 1921 Act. This argument depends upon the text of the new provision in the 1924 Act, which reads as follows:

> If the property was acquired *after December 31, 1920,* by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same

> as it would be in the hands of the grantor, * * *. (Italics ours.)

It will be recalled that in the 1921 Act, Section 202 (a) (2) was applicable to gifts "after December 31, 1920." The income-tax Title of the Revenue Act of 1921 was by its terms effective "as of January 1, 1921" (Section 263 of the Revenue Act of 1921); Congress thus made it plain that it intended the new provision of Section 202 (a) (2) to reach back to the effective date of the Act but not before that date. Indeed, it is doubtful if Congress could have made the provision applicable to prior gifts. When this Court upheld the retroactive operation of Section 202 (a) (2) with respect to gifts made in 1921 before the enactment of the statute, it said that there was no doubt as to the power of Congress with respect to "prior *but recent* transactions", and it held that Congress could properly make the provision in question applicable to "transactions consummated *within the year.*" *Cooper* v. *United States,* 280 U.S. 409, 411, 412 (italics ours).

The Revenue Act of 1924 was enacted on June 2, 1924. By Section 283 the income-tax Title of that Act was effective "as of January 1, 1924." If Congress had considered that in enacting Section 202 (a) (3) of the 1924 Act it was changing the law and prescribing a basis which had not theretofore been in effect, it seems clear that it would have limited the application of the new provision to the period to which the 1924 Act applied;

it would have made Section 202 (a) (3) applicable to property "acquired after December 31, 1923, by a transfer in trust." As has been pointed out above, there would have been grave constitutional doubt as to the power of Congress to make such a change in the law applicable to transfers made nearly three and a half years before its enactment. Such transfers could hardly be called "prior but recent transactions," and they were certainly not "transactions consummated within the year."

Congress did not, however, so limit the effect of Section 202 (a) (3) of the Revenue Act of 1924. It made that provision in terms applicable to property acquired by a transfer in trust "after December 31, 1920." We submit that there is in this evidence of the most persuasive nature that Congress did not regard this provision as a change in the law, but intended it only to remove any possible doubts as to the correctness of the existing interpretation of the 1921 Act. To construe Section 202 (a) (3) of the 1924 Act as a change in the law would lead to grave doubts as to the constitutional validity of the provision. Such doubts should be avoided, and can easily be avoided here by regarding Section 202 (a) (3) as a clarifying enactment and not as a change. In making Section 202 (a) (3) applicable to transfers "after December 31, 1920," Congress has said by almost necessary implication that it did not consider that Section 202 (a) (3) was applicable to any transaction which was not covered

by Section 202 (a) (2) of the 1921 Act. From its terms it must be concluded that the 1924 provision was "declaratory of the law which Congress meant to establish" in 1921. Cf. *Burnet* v. *Guggenheim*, 288 U.S. 280, 283.

CONCLUSION

For this reason, as well as for the reasons advanced in Point I of our principal brief, we submit that the decision of the court below on this question was correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

ERWIN N. GRISWOLD,
Special Assistant to the Attorney General.

MAY, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	3
Statement	3
Specification of errors to be urged in No. 873	5
Summary of argument	5
Argument:	
I. Under Section 202(a) (2) of the Revenue Act of 1921, the basis for determining the gain from the sale of the stock by the trustee was its cost to the grantor	8
II. The gain from the sale by the trustee is not taxable as a capital gain under Section 206 of the Revenue Act of 1921, since the property was not held by the taxpayer for more than two years	17
Conclusion	28
Appendix	29

CITATIONS

Cases:	
Anderson v. *Wilson*, 289 U.S. 20	18
Bank of Commerce v. *Tennessee*, 161 U.S. 134	24
Bankers Trust Co. v. *Commissioner*, 24 B.T.A. 10	16
Bok v. *McCaughn*, 42 F. (2d) 616	11
Brewster v. *Gage*, 280 U.S. 327	13, 21, 26
Burnet v. *Guggenheim*, 288 U.S. 280	5, 10
Burnet v. *S. & L. Bldg. Corp.*, 288 U.S. 406	14
Caminetti v. *United States*, 242 U.S. 470	19
Commissioner v. *New York Trust Co.*, 54 F. (2d) 463, certiorari denied, 285 U.S. 556	2
Commissioner v. *Rosenbloom Finance Corp.*, 66 F. (2d) 556, certiorari denied, 290 U.S. 692	11, 13
Cooper v. *United States*, 280 U.S. 409	9
Crooks v. *Harrelson*, 282 U.S. 55	23
Daniel v. *Commissioner*, 16 B.T.A. 925, affirmed, 45 F. (2d) 58	25
Darby-Lynde Co. v. *Commissioner*, 51 F. (2d) 32	25
DeGanay v. *Lederer*, 250 U.S. 376	23
Dickey v. *Burnet*, 56 F. (2d) 917, certiorari denied, 287 U.S. 606	14

55110—34——1

Cases—Continued

	Page
District of Columbia v. *Brooke*, 214 U.S. 138	10
Francis v. *Commissioner*, 15 B.T.A. 1332	16
Hamilton v. *Rathbone*, 175 U.S. 414	19
Heiner v. *Colonial Trust Co.*, 275 U.S. 232	24
Heiner v. *Donnan*, 285 U.S. 312	11, 19
Hoffer Oil Corp. v. *Commissioner*, 27 B.T.A. 98	25
Hyde v. *Shine*, 199 U.S. 62	19
Ithaca Trust Co. v. *United States*, 279 U.S. 151	11
Johnson v. *Commissioner*, 17 B.T.A. 611, affirmed, 52 F. (2d) 726	21, 22
Jordan v. *Roche*, 228 U.S. 436	14
Lake County v. *Rollins*, 130 U.S. 662	19
Lynch v. *Alworth-Stephens Co.*, 267 U.S. 364	12, 23
Maillard v. *Lawrence*, 16 How. 251	23
McCaughn v. *Hershey Chocolate Co.*, 283 U.S. 488	14, 21
McCrory v. *Commissioner*, 25 B.T.A. 994, affirmed C.C.A. 5th, decided March 19, 1934	21, 25
McKinney v. *Commissioner*, 16 B.T.A. 804	21, 25
Merle-Smith v. *Commissioner*, 42 F. (2d) 837, certiorari denied, 282 U.S. 897	14
Moore v. *Tiller*, 61 F. (2d) 478	11
New York Trust Co. v. *Commissioner*, 27 B.T.A. 1127	21
Noel v. *Parrott*, 15 F. (2d) 669, certiorari denied, 273 U.S. 754	13
Old Colony Railroad Co. v. *Commissioner*, 284 U.S. 552	23
Reinecke v. *Northern Trust Co.*, 278 U.S. 339	11
Rialto Mining Corp. v. *Commissioner*, 25 B.T.A. 980	25
Rice v. *Eisner*, 16 F. (2d) 358, certiorari denied, 273 U.S. 764	15
Ruggles v. *Illinois*, 108 U.S. 526	19
Russell v. *United States*, 278 U.S. 181	26
Scarbrough v. *Commissioner*, 18 B.T.A. 951	21, 25
Security Trust Co. v. *Commissioner*, 65 F. (2d) 877, certiorari denied, 290 U.S. 686	12
Shoenberg v. *Burnet*, 19 B.T.A. 399, affirmed, 55 F. (2d) 543	21, 22
Shwab v. *Doyle*, 258 U.S. 529	26
Spring City Foundry Co. v. *Commissioner*, Nos. 727, 728, Oct. Term, 1933, decided April 30, 1934	26
Steagall v. *Commissioner*, 24 B.T.A. 1231	21
Taft v. *Bowers*, 278 U.S. 470	9
Thompson v. *Commissioner*, 10 B.T.A. 25	25
Thompson v. *United States*, 246 U.S. 547	19
United States v. *Hartwell*, 6 Wall. 385	19
United States v. *Magnolia Co.*, 276 U.S. 160	27
United States v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77	19

Statutes: Page

Revenue Act of 1921, c. 136, 42 Stat. 227, 229, 232, 246:
Sec. 2 29
Sec. 202 29
Sec. 206 30
Sec. 219 31
Revenue Act of 1924, c. 234, 43 Stat. 253:
Sec. 204 (U.S.C., Title 26, Sec. 935) 32
Sec. 319 (U.S.C., Title 26, Sec. 1131) 10
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 208 (U.S.C. App., Title 26, Sec. 939) 33

Miscellaneous:
H.Rep. No. 1, 69th Cong., 1st Sess., p. 7 26
H.Rep. No. 179, 68th Cong., 1st Sess., p. 16 14
I.T. 1379, I-2 Cumulative Bulletin 41 13
I.T. 1622, II-1 Cumulative Bulletin 135 14
I.T. 1636, II-1 Cumulative Bulletin 20 14
I.T. 1660, II-1 Cumulative Bulletin 36 20
I.T. 1889, III-1 Cumulative Bulletin 70 20
S.Rep. No. 398, 68th Cong., 1st Sess., p. 17 15
S.Rep. No. 52, 69th Cong., 1st Sess., p. 18 27
Treasury Regulations 62:
Art. 1562 34
Art. 1563 34
Art. 1651 35
Treasury Regulations 65, Art. 1651 21

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company

No. 899

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, Dated December 24, 1921, by and between Conrad Henry Matthiessen and said the New York Trust Company, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMISSIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 29–34) is reported in 27 B.T.A. 1127. The major-

ity and dissenting opinions of the Circuit Court of Appeals (R. 39–42) are reported in 68 F. (2d) 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1933 (R. 43). A petition for a writ of certiorari was filed by the Commissioner on March 17, 1934, and by the New York Trust Company on March 24, 1934. Certiorari was granted April 9, 1934 (R. 45). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

In 1906, one Matthiessen acquired certain shares for $141,375. Their cost was greater than their fair market value on March 1, 1913. On December 24, 1921, when the shares had a market value of $577,500, he transferred them to the New York Trust Company in trust for the benefit of his son. In 1922 the trustee sold the shares for $603,385. The questions raised by the two petitions are as follows:

No. 899

Whether the stock was acquired by gift within the meaning of Section 202 (a) (2) of the Revenue

[1] The Board of Tax Appeals originally dismissed this proceeding for lack of jurisdiction (20 B.T.A. 162), but on the Government's appeal this order was reversed and the case was remanded for hearing on the merits. *Commissioner* v. *New York Trust Co.*, 54 F.(2d) 463 (C.C.A. 2d), certiorari denied, 285 U.S. 556.

Act of 1921, so that the basis is the cost to the grantor, or whether the basis is the fair market value on December 24, 1921.

No. 873

If the cost to the grantor is the basis, whether the period that the stock was held by the grantor may be considered in determining whether the gain on the sale by the trustee was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921, which defines capital assets as property "held by the taxpayer * * * for more than two years."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 29–36.

STATEMENT

The facts found by the Board of Tax Appeals (R. 30–31) may be summarized as follows:

On April 27, 1906, Conrad Henry Matthiessen, a resident of New York (R. 6), acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375. This cost exceeded the fair market value of the stock on March 1, 1913. (R. 30.)

In order to make a settlement for his son, Matthiessen transferred the stock to the New York Trust Company in trust to accumulate the income and pay the accumulations to the son when he became twenty-one, thereafter to pay him the income yearly until he became twenty-five and at that time

to transfer the shares to him, with remainders over in the event of his death. The transfer was made by an irrevocable deed of trust dated December 24, 1921. On that date the shares had a fair market value of $577,500. (R. 31.)

During the year 1922 the New York Trust Company sold the 6,000 shares which it held as trustee for $603,385 (R. 31).[2]

In the audit of the trustee's return for 1922 the Commissioner determined that the cost of the stock to the grantor and not the fair market value of the stock as of December 24, 1921, should be used as a basis, and held that the gain was not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra*, pp. 30–31) (R. 5–6, 31).

The trustee appealed to the Board, claiming that the proper basis was the fair market value of the shares as of the date when they were acquired by the trustee, and that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional, and in the alternative, that if that provision applied, the tax should be computed under the capital gain provision (R. 3). The Board sustained the Commissioner's determination (R. 34). On appeal to the Circuit Court of Appeals, that court, with one judge dissenting, sustained the Commissioner's determination as to the proper basis for computing the amount of the gain, but concluded that the gain was taxable as a capital net gain and not as ordinary income.

---

[2] The grantor's son Erard Matthiessen had not reached the age of twenty-one during 1922 (R. 31).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 873

The Circuit Court of Appeals erred:

1. In holding that the gain from the sale of the stock by the respondent in 1922 was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921.

2. In holding that the gain from the sale of the stock by the respondent in 1922 was not taxable as ordinary income.

3. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

Under Section 202 (a) (2) of the Revenue Act of 1921 (*infra*, p. 29), which is applicable to "property, acquired by gift", the basis for determining the gain from the sale of the stock by the trustee was its cost to the grantor. In the present case the trustee who sold the stock received it by an irrevocable transfer in trust, which completely divested the grantor of all ownership of or interest in the property. The transfer of title from the donor to the trustee was made by delivery of the securities and was without consideration. This was a gift in trust, as distinguished from a gift direct, but it was none the less a gift. If there could have been any doubt on this question, it is removed, we submit, by this Court's decision in *Burnet* v. *Guggenheim*, 288 U.S. 280. Since, as it

was there held, the relinquishment of a power to revoke a trust constitutes a gift, it would seem to follow *a fortiori* that the creation of an irrevocable trust is likewise a gift.

A gift is a transaction affecting the legal title to property. The essential requirements of a gift have been developed at law as distinguished from in equity. Gifts may be beneficial or otherwise; but if a gratuitous transfer does not result to the benefit of the transferee, the reasons lie in equity—the transaction is none the less a gift at law.

The Bureau of Internal Revenue has consistently construed the phrase "acquired by gift" to include irrevocable transfers in trust. These rulings have not been revoked and are still in effect. This long continued administrative interpretation of the statute is entitled to great weight.

In the Revenue Act of 1924, Congress included a specific provision relating to transfers in trust. We submit that in so doing Congress was enacting into law the accepted administrative interpretation in order to remove any possible doubt as to the correctness of that interpretation.

II

The gain from the sale by the trustee is not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra,* pp. 30–31). In that section the term "capital assets" is defined as property "held by the taxpayer" for more than two years. In this case, the trust is the taxpayer, and it is un-

disputed that the trust had not held the property for two years. There is no ambiguity in the statute. It allows no room for construction.

The conclusion that the property sold by the trustee did not constitute "capital assets" is not only required by the plain text of the statute itself, but this was the contemporaneous construction of the Treasury Department which has been uniformly followed by the Board of Tax Appeals and by the courts, until the decision of the court below in the present case. The question was passed on in three rulings of the Treasury Department, beginning in 1921. Thereafter the issue was raised before the Board of Tax Appeals, and the Board in at least six cases reached the same conclusion. The same result was reached in two appellate courts. The decision of the court below, more than twelve years after the enactment of the statute, was the first decision of any court or tribunal to the contrary. In so doing, we submit that the court below ignored the rule that the plain meaning of a statute may not be circumvented by "construction."

The rule for which the taxpayer contends was expressly adopted in Section 208 of the Revenue Act of 1926 (*infra*, pp. 33–34). But such a change in the law cannot authorize construction of an earlier Act not consonant with the language there employed. Here the change in the statute is contrary to the plain language of the earlier law and also to the

uniform administrative construction of that law. The change shows a recognition of the administrative construction and a desire on the part of Congress to establish a different rule for the future. Congress could have made the change retroactive if it had desired; but it did not do so.

ARGUMENT

I

UNDER SECTION 202 (a) (2) OF THE REVENUE ACT OF 1921, THE BASIS FOR DETERMINING THE GAIN FROM THE SALE OF THE STOCK BY THE TRUSTEE WAS ITS COST TO THE GRANTOR

Section 202 (a) (2) of the Revenue Act of 1921 (*infra*, p. 29) provides that the basis for ascertaining the gain or loss sustained from a sale of property shall be the cost of the property, except that—

> In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

In the present case, the trustee who sold the stock received it by an irrevocable transfer in trust, which completely divested the grantor of all ownership of or interest in the property. The transfer of title from the donor to the trustee was made by delivery of the securities, and was without consideration. Clearly, the donor made a gift to someone. The trustee received the title, not for its own benefit, but upon a trust for others. In other words, the

gift was not direct to the intended beneficiaries, but to a trustee for them. It was a gift in trust, as distinguished from a gift direct, but it was none the less a gift, because it was a transfer of the property by delivery, *inter vivos,* and without consideration. If title passed to the trustee at all (and everyone agrees it did) it must have passed by gift. No other known legal machinery for passing title is applicable to the actual transaction. Since the title passed by gift, and passed to the trustee, it must follow that the trustee acquired the property by gift. The transaction was, therefore, covered by Section 202 (a) (2), *supra,* since that provision is in terms applicable to property "acquired by gift."

The basis for determining gain or loss in the case of purchases of property is prescribed in other subdivisions of Section 202, and these subdivisions show by contrast that the provision involved in this case was intended to cover all acquisitions of property without cost. In *Taft* v. *Bowers,* 278 U.S. 470, this Court recognized that the purpose of Congress in enacting Section 202 (a) (2) was to prevent the escape from taxation of the increase in value of property which was possible under earlier statutes under which an owner of property could transfer it to his wife or children, and thus establish a new and increased basis for measuring the gain upon its sale. See also *Cooper* v. *United States,* 280 U.S.

409. And as this Court said in *District of Columbia* v. *Brooke*, 214 U.S. 138, 150, " not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated." It is obvious that evasion could be accomplished as readily and as satisfactorily by the donor if he transferred his property in trust for his wife or children as if he made an outright gift to them. It would therefore seem to follow that Congress intended the word "gift" in Section 202 (a) (2) to include gifts in trust as well as direct gifts. The mischief is the same in either case, and the language used was apt to cover both, for the phrase "property, acquired by gift" is plainly broad enough to include gifts in trust as well as gifts direct.

If there could have been any doubt on this question, it is removed, we submit, by this Court's decision in *Burnet* v. *Guggenheim*, 288 U.S. 280. That case involved Section 319 of the Revenue Act of 1924 (U.S.C., Title 26, Sec. 1131), imposing a tax upon "the transfer by a resident by gift * * * of any property wherever situated, whether made directly or indirectly, * * *." This Court held that the surrender of the power to revoke a revocable deed of trust constituted a transfer of the property by gift and was thus subject to the tax. Since the relinquishment of a power to revoke a trust constitutes a gift, it would seem to follow *a*

fortiori that the creation of an irrevocable trust is likewise a gift.[3]

This conclusion is supported by many other cases in which gratuitous transfers of property in trust have been held to be gifts. Thus, in *Moore* v. *Tiller*, 61 F. (2d) 478 (C.C.A. 5th), the court said (p. 479):

> The manifestation of an intention to make a present gift to another, and, in consummation of this intention, delivery of the property to *or for the use of the intended donee*, or some act indicating a renunciation of dominion in favor of the intended donee, are essentials of a gift, whether *inter vivos* or *causa mortis*. * * * (Italics ours.)

Similar language is found in *Bok* v. *McCaughn*, 42 F. (2d) 616, 618 (C.C.A. 3d). See also *Ithaca Trust Co.* v. *United States*, 279 U.S. 151.

We submit that there is no merit in the argument of the trustee that it did not acquire the property by gift within the meaning of the statute because it did not receive the ultimate beneficial interest in the property.[4] Apart from the considerations

---

[3] In *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 346, 347, 348, this Court repeatedly referred to transfers in trust as gifts. And in *Heiner* v. *Donnan*, 285 U.S. 312, 320, this Court said, in stating the facts, that "Donnan, by complete and irrevocable gift *inter vivos*, transferred without consideration certain securities to trustees for his four children."

[4] The ultimate beneficial interest in the property of a corporation is in its stockholders and not in the corporation itself. Nevertheless property transferred to the corporation without consideration is acquired by the corporation by gift for tax purposes. *Commissioner* v. *Rosenbloom Finance Corp.*, 66 F. (2d) 556 (C.C.A. 3d), certiorari denied, 290 U.S. 692.

already advanced, this argument ignores the fact that under both Section 2 (9) and Section 219 of the Act (*infra*, pp. 29, 31–32), the trust is the taxpayer, and the trustee is simply charged with the duty of making the return. In a trust such as this, where the income is to be accumulated and the trust alone is taxed on the income during the period of accumulation, the trust (through the agency of the trustee) represents all the interests in the property. Admittedly the trust is regarded as a unit for the purpose of taxing the gain from the sale of the property. Just as the sale by the trustee is a sale of the property itself and not of separate interests in it, so the acquisition by the trustee is an acquisition of the property. Though the trustee did not receive the beneficial interest, it did acquire the legal title, and it acquired that title by gift. The taxpayer's argument makes the statute applicable only to the sale of the beneficial interest; but the statute itself makes no such limitation. The taxpayer's argument on this point, it would seem fair to say, falls within this Court's language in *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370, where it said:

> And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

A similar argument was advanced and rejected in *Security Trust Co.* v. *Commissioner*, 65 F. (2d)

877 (C.C.A. 6th), certiorari denied, 290 U.S. 686, where it was held that a testamentary trustee acquires the property by bequest or devise as of the date of the decedent's death, so that the basis is the fair market value at that time. Since a testamentary trustee acquires property by bequest or devise, though the bequest or devise is for the ultimate benefit of beneficiaries and not for the trustee, it would seem to follow that the trustee acquired the property in this case by gift, although the gift was not for its own benefit.

A gift is a transaction affecting the legal title to property. The essential requirements of a gift have been developed at law, as distinguished from in equity. A gift is merely a voluntary transfer of property by one to another without consideration, and effectuated through delivery either of the property or of a deed representing the property. *Commissioner* v. *Rosenbloom Finance Corp.*, 66 F. (2d) 556 (C.C.A. 3d), certiorari denied, 290 U.S. 692; *Noel* v. *Parrott*, 15 F. (2d) 669 (C.C.A. 4th), certiorari denied, 273 U.S. 754. Gifts may be beneficial or otherwise; but if a gratuitous transfer does not result to the benefit of the transferee, the reasons lie in equity—the transaction is none the less a gift at law.

The Bureau of Internal Revenue has consistently construed the phrase "acquired by gift" to include irrevocable transfers in trust. See I.T. 1379, I–2 Cumulative Bulletin (July–December 1922) 41

(transfer by will); I.T. 1636, II–1 Cumulative Bulletin (January–June 1923) 20; I.T. 1622, II–1 Cumulative Bulletin (January–June 1923) 135. These rulings have not been revoked and are still in effect. This long-continued administrative interpretation of the statute is entitled to great weight. *Brewster* v. *Gage*, 280 U.S. 327; *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488.

In the court below it was argued that since Congress in enacting the Revenue Act of 1924 included a specific provision concerning the basis to be used in measuring gain in the case of property transferred in trust (Section 204 (a) (3); *infra*, pp. 32–33), it must be assumed that the law prior to that time was different. We submit that in view of the fact that the administrative rulings under the Revenue Act of 1921 were to the same effect as the new provision, it is more reasonable to assume that Congress was enacting into law the accepted interpretation of existing law in order to remove any possible doubt as to the correctness of that interpretation. *Jordan* v. *Roche*, 228 U.S. 436, 445–446; *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837, 842 (C.C.A. 2d), certiorari denied, 282 U.S. 897; *Dickey* v. *Burnet*, 56 F. (2d) 917 (C.C.A. 8th), certiorari denied, 287 U.S. 606. See also *Burnet* v. *S. & L. Bldg. Corp.*, 288 U.S. 406.

The statement of the Ways and Means Committee of the House of Representatives in regard to the change in the law was as follows (House Rep. No. 179, 68th Congress, 1st Sess., p. 16):

Section 204:

> (1) There is no provision in the existing law which corresponds to paragraph (3). This paragraph applies the same principles to transfers to a trustee as is applied in paragraph (2) to gifts, and provides that where property was acquired after December 31, 1920, by a transfer in trust, the basis for determining the gain or loss from its sale shall be the same as it would be in the hands of the grantor.

Senate Rept. No. 398, 68th Congress, 1st Sess., p. 17, is as follows:

> There is no provision in the existing law which corresponds to paragraph (3) of subdivision (a). According to this paragraph, the basis for determining gain or loss from the sale or other disposition of property acquired after December 31, 1920, by a voluntary transfer in trust, is the same as it would be in the hands of the grantor, following the principle laid down in paragraph (2) as to gifts. If the transfer in trust resulted in the recognition of a taxable gain or a deductible loss to the grantor, then this basis will be increased or decreased accordingly.

These statements give no indication that Congress was intending to change the law as it had been interpreted by the Bureau; they are equally consistent with the view that Congress intended only to make clear in the statute what had theretofore been left to interpretation. The situation is somewhat similar to that involved in *Rice* v. *Eisner*,

16 F. (2d) 358, 360 (C.C.A. 2d), certiorari denied, 273 U.S. 764.

The trustee relies upon the decisions of the Board of Tax Appeals in *Francis* v. *Commissioner*, 15 B.T.A. 1332, and *Bankers Trust Co.* v. *Commissioner*, 24 B.T.A. 10. The Board distinguished both of these cases in its decision in the present case, and we submit, correctly. In the *Francis* case there was no gift of the property after December 31, 1920, and Section 202 (a) (2) of the Revenue Act of 1921 only applies to property acquired by gift after that date. In the *Bankers Trust* case the transfer was not absolute and irrevocable, for by its terms the grantor reserved an interest in the income and upon the happening of certain events the principal would return to his estate. Such a transaction obviously falls far short of the common law requirement for a gift.

In the present case the trust was irrevocable and the grantor reserved no interest of any kind in the income or in the principal of the trust property. The gift was as complete when the trust was created as it would ever be. The transaction constituted not a purchase but a transfer without consideration, that is, a gift; and Section 202 (a) (2) required that the increment in the value of the stock during the period that it was held by the grantor should be included in the gain from the sale.

II

THE GAIN FROM THE SALE BY THE TRUSTEE IS NOT TAXABLE AS A CAPITAL GAIN UNDER SECTION 206 OF THE REVENUE ACT OF 1921, SINCE THE PROPERTY WAS NOT HELD BY THE TAXPAYER FOR MORE THAN TWO YEARS

Section 206 of the Revenue Act of 1921 (*infra*, p. 30) provides that the net gain from the sale of capital assets may be taxed at the rate of 12½% instead of at the ordinary rates, and provides that the term "capital assets" as used in the section shall mean—

> property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), * * *.

In Section 2 (9) of the Act the term "taxpayer" is defined as including—

> any person, trust or estate subject to a tax imposed by this Act;

By Section 219 of the same Act it is provided:

> (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (3) Income held for future distribution under the terms of the will or trust; * * *
>
> * * * * *
>
> (c) In cases under paragraphs (1), (2), or (3) of subdivision (a) * * * the tax shall be imposed upon the net income of

> the estate or trust and shall be paid by the fiduciary, * * *.

When these provisions of the statute are applied to the facts of this case, we submit that there can be no possible doubt as to their meaning and application. There is no dispute as to the facts. A trust was created on December 24, 1921, with the New York Trust Co. as trustee. By the terms of the trust, the trustee was directed to collect the income and accumulate it until Erard A. Matthiessen should reach the age of 21 years. Erard Matthiessen had not reached the age of 21 during the year 1922, the tax year in question (R. 31). The trust was, therefore, one under which the income was "held for future distribution" under Section 219 (a) (3) of the statute. Under paragraphs (a) and (c) of Section 219, the income of such a trust was expressly subjected to the tax imposed by Sections 210 and 211 of the Act. Under Section 2 (9), the trust was, therefore, expressly defined as the "taxpayer." *Anderson* v. *Wilson,* 289 U.S. 20, 27. Since it is undisputed that the trustee in this case had not held the property for two years, it must follow that the taxpayer had not held the property for two years, and thus that the property in question did not constitute "capital assets" as that term is defined in Section 206 of the Revenue Act of 1921.

There is no ambiguity in the statute; its terms are clear. The statute provides no exception of any sort; it allows no room for construction. As

this Court said in *United States* v. *Hartwell*, 6 Wall. 385, 396:

> If the language be clear it is conclusive. There can be no construction where there is nothing to construe.

This Court has recently applied this rule in *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83. See also *Ruggles* v. *Illinois*, 108 U.S. 526, 534; *Lake County* v. *Rollins*, 130 U.S. 662, 670–671; *Hamilton* v. *Rathbone*, 175 U.S. 414, 419; *Caminetti* v. *United States*, 242 U.S. 470; *Thompson* v. *United States*, 246 U.S. 547, 551.[5] "Where the statute contains no exception, the courts cannot create one." *Hyde* v. *Shine*, 199 U.S. 62, 78. To do so "would be to enact a law under the pretense of construing one." *Heiner* v. *Donnan*, 285 U.S. 312, 331.

The conclusion that the property sold by the trustee in this case did not constitute "capital assets" is not only required by the plain text of the statute itself, but this was the contemporaneous construction of the Treasury Department which has been uniformly followed by the Board of Tax Appeals and by the courts, until the decision of the

[5] In *Hamilton* v. *Rathbone*, *supra*, this Court said (p. 419): "But where the Act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." And in *Thompson* v. *United States*, *supra*, this Court said (p. 551): "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

court below in the present case. The question arose in the Treasury Department very shortly after the enactment of the Revenue Act of 1921. It was first passed upon in I.T. 1379, I–2 Cumulative Bulletin (July–December 1922) 41, which was promulgated in July 1922, during the tax year in question in this case. That ruling involved stock which had been given to a trust company in trust, and the question passed on was precisely the same as that raised here. It was held that—

> Section 206 of the Revenue Act of 1921 has no application, because the securities have not been held by the trustee for a period of two years prior to the sale.

The same question was also directly involved in I.T. 1660, II–1 Cumulative Bulletin (January–June 1923) 36, which was promulgated before the trustee in this case filed its return. That ruling involved facts substantially the same as those here, so far as the present case is concerned. Its holding is in the following terms:

> Held, the date of acquisition of the stock for the purposes of Section 206 of the Act, if the stock constituted a gift inter vivos, was the date upon which the gift was made; * * *. Therefore, as the stock had not been held for more than two years prior to its sale, the taxpayer will not be permitted to treat the amount of profit derived from the sale as capital gain.

A similar ruling was made in I.T. 1889, III–1 Cumulative Bulletin (January–June 1924) 70, where

the question at issue was the date of acquisition of property acquired by will.[6]

This construction of the statute received legislative approval when Congress reenacted the definition of capital assets in the Revenue Act of 1924 without change. See Section 208 (a) (8) of the Revenue Act of 1924. The administrative construction, therefore, being contemporaneous, and having been accepted by Congress in the reenactment of the statute, should be given the force and effect of law. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488; *Brewster* v. *Gage*, 280 U.S. 327. This is especially true where the departmental practice merely carries into effect the plain and unambiguous terms of the statute itself.

Following the administrative construction of the statute in the Treasury Department, taxpayers raised the issue before the Board of Tax Appeals, and the Board in at least six cases reached the same conclusion.[7] The same result was reached in two

---

[6] Article 1651 of Regulations 62 (*infra*, pp. 35–36), under the Revenue Act of 1921, and Article 1651 of Regulations 65, under the Revenue Act of 1924, define the term "capital assets", in the language of the statute, as property "held by the taxpayer" for more than two years.

[7] *McKinney* v. *Commissioner*, 16 B.T.A. 804; *Johnson* v. *Commissioner*, 17 B.T.A. 611, affirmed, 52 F. (2d) 726 (C.C.A. 3d); *Shoenberg* v. *Commissioner*, 19 B.T.A. 399, affirmed, 55 F. (2d) 543 (App.D.C.); *Steagall* v. *Commissioner*, 24 B.T.A. 1231; *McCrory* v. *Commissioner*, 25 B.T.A. 994, affirmed without consideration of this point, C.C.A. 5th, decided March 19, 1934; *New York Trust Co.* v. *Commissioner*, 27 B.T.A. 1127 (the present case).

appellate courts before whom taxpayers brought these decisions of the Board for review. *Johnson* v. *Commissioner,* 52 F. (2d) 726 (C.C.A. 3d); *Shoenberg* v. *Burnet,* 55 F. (2d) 543 (App.D.C.). These courts rejected the argument that a donee may consider the time that the donor held the property in order to bring himself within the two-year requirement of Section 206, on the ground that the donee must use the donor's basis in measuring his loss. In the *Johnson* case the court said (p. 727):

> Indeed, the words used by Congress in section 206 are so plain that there is no call for construction or conjecture.

The court also pointed out that Section 202, relating to the basis for determining gain or loss, and Section 206, defining the phrase "capital assets", have no necessary relation, and that the provisions of the one section are wholly independent of the provisions of the other.

The decision of the court below, more than twelve years after the enactment of the statute, and with one judge dissenting (R. 42), was the first decision of any court or tribunal holding that the time during which the property was held by the grantor may be added to the time during which it was held by the trustee for the purpose of measuring the two-year period provided in Section 206. In reaching this result, the majority of the court below made no mention of the contemporaneous and uniformly continued administrative construction, nor of the unbroken line of decisions of the Board of Tax Ap-

peals. It expressly recognized (R. 40) that the taxpayer "did not 'hold' the property for two years in the usual sense." It held, nevertheless, that the trustee must be "treated as though he had" held the property for two years (R. 41). This conclusion is apparently based largely on the ground that the contrary result "seems to us an extremely improbable one for Congress to have intended" (R. 40). But the court's concession that the trustee had not held the property for two years "in the usual sense" seems to be fatal to the result which it reached. This Court has repeatedly held that the words of a statute must be given their "usual, ordinary and everyday meaning." *Old Colony Railroad Co.* v. *Commissioner,* 284 U.S. 552, 561. See also *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364, 370; *DeGanay* v. *Lederer,* 250 U.S. 376, 381; *Maillard* v. *Lawrence,* 16 How. 251, 261. And this Court has also held that the plain meaning of a statute may not be circumvented by "construction" merely because "hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation." *Crooks* v. *Harrelson,* 282 U.S. 55, 60. In the latter case this Court also said (p. 61):

> But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction.

This rule is as applicable in favor of the Government as against it, especially where as here the statutory provision in question is one of exemption as to which all doubts must be resolved against the taxpayer. *Bank of Commerce* v. *Tennessee*, 161 U.S. 134, 146; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235.

The conclusion that the word "taxpayer" as used in Section 206 means the trustee in this case and not the trustee together with the donor (who is not subjected to any tax on the transaction) is fortified by another group of cases. In Section 204 (c) of the Revenue Act of 1924 it is provided that "in the case of mines, oil and gas wells, discovered by the taxpayer after February 28, 1913", the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter. It has been contended in several cases that this provision is applicable where the discoverer of the oil well or mine turns it over to a corporation in return for all the stock of the corporation. Where such a transfer is made, no gain or loss is recognized, and the transferee takes as its basis for determining gain or loss the basis of the transferor. Section 203 (b) (4) of the Revenue Act of 1924. The argument made is that since the transferee takes the transferor's basis, it must be regarded as standing in the shoes of the transferor, and is, therefore, entitled to a depletion allowance based on discovery. The argument is, therefore, substantially the same as that advanced in the pres-

ent case. It has, however, been uniformly rejected. *Darby-Lynde Co.* v. *Commissioner,* 51 F. (2d) 32 (C.C.A. 10th); *Rialto Mining Corp.* v. *Commissioner,* 25 B.T.A. 980; *Hoffer Oil Corp.* v. *Commissioner,* 27 B.T.A. 98. The same contention has been advanced and similarly rejected where the taxpayer in question (as the trustee here) is a donee, and therefore takes his donor's basis. *Thompson* v. *Commissioner,* 10 B.T.A. 25; *McKinney* v. *Commissioner,* 16 B.T.A. 804; *Daniel* v. *Commissioner,* 16 B.T.A. 925, affirmed on other grounds, 45 F. (2d) 58 (C.C.A. 5th); *Scarbrough* v. *Commissioner,* 18 B.T.A. 951; *McCrory* v. *Commissioner,* 25 B.T.A. 994, affirmed on other grounds, C.C.A. 5th, decided March 19, 1934.

In the court below the taxpayer relied almost solely on the fact that the rule for which it contends was expressly adopted in Section 208 of the Revenue Act of 1926 (*infra,* pp. 33–34). In that Act, the following sentence was added to the definition of the term "capital assets":

> In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

This change in the law was referred to in the opinion of the court below (R. 40). But this change "introduced into the Act of 1926 can not authorize construction of the earlier one not consonant with the language there employed." *Russell* v. *United States*, 278 U.S. 181, 188. The situation seems indistinguishable from that involved in *Spring City Foundry Co.* v. *Commissioner*, Nos. 727, 728, October Term, 1933, decided April 30, 1934, where this Court said:

> We think the fair import of this provision, as contrasted with the earlier one, is that the Congress, recognizing the significance of the existing provision and its appropriate construction by the Treasury Department, deliberately intended a change in the law.

See also *Schwab* v. *Doyle*, 258 U.S. 529, 536; *Brewster* v. *Gage*, 280 U.S. 327, 337.

We are not unmindful that we have argued in Point I above that the change in the statute there involved represented no change in the law but merely enacted into law the administrative interpretation of the earlier statute. The argument there is in no way inconsistent with our position here. There the change in the text of the statute was in precise accord with the administrative interpretation of the prior law. Here the change in the statute is contrary to the administrative construction of the prior law as well as to its plain language. It shows a recognition of the administrative construction by Congress and a desire on the

part of Congress to change the law for the future. Congress could have made the change retroactive if it had desired to do so; but it did not. Congress must, therefore, have intended a change in enacting the present provision, and this is confirmed by the committee reports. In House Report No. 1, 69th Congress, 1st Sess., the House Committee on Ways and Means said (p. 7):

> The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

To the same effect is Senate Report No. 52, 69th Congress, 1st Sess., p. 18. These reports show that the committees of Congress referred to the provision as an "amendment." They furnish no basis for the contention that Congress desired that Section 208 (a) (8) of the Revenue Act of 1926 should be given retroactive effect. In the absence of such an intention, the new provision has no effect on cases arising under the earlier Act. *United States* v. *Magnolia Co.*, 276 U.S. 160.

There is consequently no support, either in the terms of the statute itself, in its administrative construction, or in the change introduced in the 1926 Act for the construction which the Circuit Court of Appeals has placed upon the statute. Since the

property here in question was not held by the taxpayer for more than two years, the gain from the transaction must be treated as an ordinary gain and not as a capital gain.

CONCLUSION

The decision of the Circuit Court of Appeals on the first issue should be affirmed, and its decision on the second issue should be reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

FRANK J. WIDEMAN,
Assistant Attorney General.

ERWIN N. GRISWOLD,
JAMES W. MORRIS,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

MAY 1934.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 229, 232, 246

SEC. 2. That when used in this Act—

* * * * *

(9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property ac-

quired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

* * * * *

(b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but— * * *

SEC. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

* * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in

the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income held for future distribution under the terms of the will or trust; and

* * * * *

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. * * *

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within sub-

division (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

REVENUE ACT OF 1924, C. 234, 43 STAT. 253

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made. The provisions of this paragraph shall not apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921 or in subdivision (c), (d), or (f) of section 302 of this Act. (U.S.C., Title 26, Sec. 935.)

REVENUE ACT OF 1926, C. 27, 44 STAT. 9

SEC. 208. (a) For the purposes of this title—

* * * * *

(8) The term "capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 204 the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the

property exchanged. In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of subdivision (c) of section 203 of this Act or of the Revenue Act of 1924, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

TREASURY REGULATIONS 62, UNDER THE REVENUE ACT OF 1921

ART. 1562. *Sale of property acquired by gift after December 31, 1920.*—In computing the gain or loss from the sale or other disposition of property acquired by gift subsequent to December 31, 1920, the basis shall be the same as it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. This basis in the hands of the donor or last preceding owner by whom it was not acquired by gift shall be determined under the provisions of article 1561 and the taxable gain or deductible loss from the sale or exchange shall be computed in accordance therewith. * * *

ART. 1563. *Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise,*

or inheritance.—In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (a) such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death, and (b) such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death. See further section 402 (c) and (e) and Regulations 63, articles 17–21, 24 and 25. In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the taxable gain or deductible loss from the sale or other disposition thereof shall be computed in accordance with article 1561. * * *

ART. 1651. *Definition and illustration of capital net gain.*—(a) Section 206 applies only to sales or exchanges of capital assets consumated after December 31, 1921. It provides that any taxpayer other than a corporation may, if he so desires, state separately in his return his net gain on sales or exchanges of capital assets and pay on such capital net gain (as defined and limited in the section) a flat tax of 12½ percent in lieu of the tax he would otherwise pay on such income under sections 210 and 211. On his net income from other sources, termed "ordinary net income" in this section, he

would be taxed under those sections. If, however, he elects thus to segregate his capital net gain, his total tax on the aggregate amount of both kinds of income must be at least 12½ percent thereof. The term "capital assets" is defined to mean property of any kind whatever acquired and held by the taxpayer for profit or investment for more than two years, whether or not connected with his trade or business, not including property (for example, a dwelling) held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind properly included in an inventory. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 873.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, DATED DECEMBER 24, 1921, BY AND BETWEEN CONRAD HENRY MATTHIESSEN AND SAID THE NEW YORK TRUST COMPANY,
Respondent.

No. 899.

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, DATED DECEMBER 24, 1921, BY AND BETWEEN CONRAD HENRY MATTHIESSEN AND SAID THE NEW YORK TRUST COMPANY,
Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

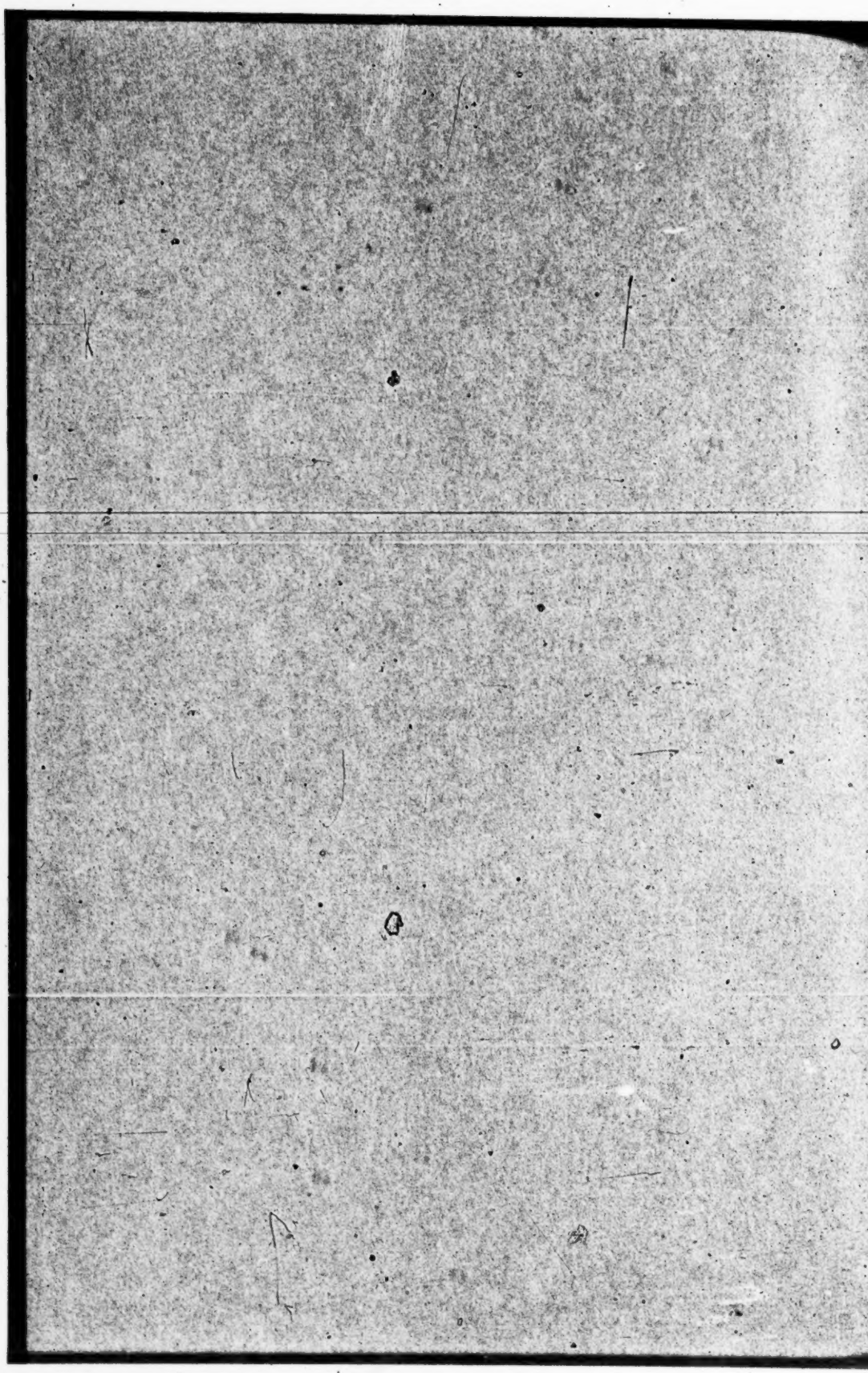
ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN No. 873 AND FOR PETITIONER IN No. 899.

J. DuPRATT WHITE,
Counsel for Respondent
in No. 873, for Petitioner
in No. 899.

RUSSELL D. MORRILL,
CHAUNCEY NEWLIN,
of Counsel.

The Rumford Press, Inc., Printing Office, Inc., 154 Fulton St., New York, N. Y.



INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Specification of Errors to be Urged	4
Summary of Argument	4
Argument:	
I. Section 202(a)(2) does not apply, and the basis for computing profit is value of the stock at the time it was transferred in trust	7
A. The statute does not apply to a sale by the trustee of property transferred in trust	7
B. The basis is value at the time the stock was transferred in trust	14
II. If Section 202(a)(2) is applicable, the gain is taxable as a capital gain under Section 206	15
Conclusion	26
Appendix	27

CITATIONS

CASES:

	PAGE
Alexander v. *King*, 46 F. (2) 235	18
Anderson v. *Wilson*, 289 U. S. 20	7, 13
Bankers Trust Company, Trustee, 24 B. T. A. 10	14, 15
Baltzell v. *Mitchell*, 3 F. (2) 428	13
Bass v. *Hazeley*, 62 F. (2) 721	8*
Bavins v. *London etc. Bank*, 1 Q. B. 270	10*
Bernier v. *Bernier*, 147 U. S. 242	17
Blair v. *Rosseter*, 33 F. (2) 286	8*
Bowers v. *New York and Albany Lighterage Company*, 273 U. S. 346	14
Brewster v. *Gage*, 280 U. S. 327	15, 23, 24
Brown v. *Duchesne*, 19 How. 183	16
Brunton, 15 B. T. A. 727	15
Burnet v. *Guggenheim*, 288 U. S. 280	8, 11, 17, 18, 19, 22, 24
Burnet v. *Harmel*, 287 U. S. 103	18, 23
Burnet v. *Wells*, 289 U. S. 670	22
Busch v. *Commissioner*, 50 F. (2) 800	13
Cazallis v. *Ingraham*, 110 Atl. (Me.) 359	9*
Commissioner v. *Marshall Field*, 42 F. (2) 820	7
Commissioner v. *Sansome*, 60 F. (2) 931	25
Corliss v. *Bowers*, 281 U. S. 376	21
Cortland Specialty Co. v. *Commissioner*, 60 F. (2) 937	24
Crooks v. *Harrelson*, 282 U. S. 55	14
Croxall v. *Shererd*, 5 Wall. 268	7*
Doe v. *Laming*, 2 Burrow, 1109	7*
Darby-Lynde Co. v. *Commissioner*, 51 F. (2) 32	25
Elfreth, 15 B. T. A. 147	8
Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204	17
Forsyth v. *Reynolds*, 15 How. 358	8*
Francis Francis, 15 B. T. A. 1332	14, 15

* Footnote.

CASES—Continued

	PAGE
Gannon v. *McGuire*, 47 N. Y. Supp. 870	9*
Gould v. *Gould*, 245 U. S. 151	14
Harris, 14 B. T. A. 1259	15
Hazewell v. *Coursen*, 13 Jones & Sp. 22	10*
Heiner v. *Tindle*, 276 U. S. 582	15
Hewett, 14 B. T. A. 281	15
Ingram v. *Colgan*, 106 Cal. 113, 38 Pac. 315	8*
Johnson v. *Commissioner*, 52 F. (2) 726	4
Kirchner v. *Lenz*, 114 Ia. 527, 87 N. W. 497	8*
Lake County v. *Rollins*, 130 U. S. 662	22
Lewellyn v. *Frick*, 268 U. S. 238	13
Littig v. *Vestry*, 61 Atl. (Md.) 635	9*
Lucas v. *Daniel*, 45 F. (2) 58	15
Martin v. *Martin*, 202 Ill. 382, 67 N. E. 1	8*
Matthiessen v. *United States*, 65 Ct. Cl. 484	15
Mead Realty Co., 21 B. T. A. 1062	8*
Mercer v. *Jones*, 3 Camp. N. P. 477	10*
Merchants' Loan & Trust Co. v. *Patterson*, 308 Ill. 519, 139 N. E. 912	7*
Merchants' Loan & Trust Co. v. *Smietanka*, 255 U. S. 509	14
Merritt v. *Cameron*, 137 U. S. 542	24
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488	24
McKenzie v. *Harrison*, 120 N. Y. 260	8*
Moore v. *Tiller*, 61 F. (2) 478	9*
Noel v. *Parrott*, 15 F. (2) 669	8*
O'Malley-Keyes v. *Eaton*, 24 F. (2) 436	8
Partington v. *Attorney General*, L. R. 4 H. L. 100	14
Pinellas Ice & Cold Storage Company v. *Commissioner*, 287 U. S. 462	23
Rice v. *Eisner*, 16 F. (2) 358	15
Roxburghe v. *Burnet*, 58 F. (2) 693	13
Ruggles v. *Illinois*, 108 U. S. 526	22
Schumacher v. *U. S.*, 55 F. (2) 1007	8*
Shoenberg v. *Burnet*, 55 F. (2) 543	4

* Footnote.

CASES—Continued PAGE

Shwab v. *Doyle*, 258 U. S. 529 13
Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602 14
Taft v. *Bowers*, 278 U. S. 470 16
Unaka & City National Bank v. *U. S.*, 50 F. (2) 1031 ..... 8*
United States v. *Hartwell*, 6 Wall. 385 22
United States v. *Kauffmann*, 52 F. (2) 1045 25
United States v. *Wigglesworth*, 2 Story 369 14
Walton v. *Walton*, 7 Johnson's Chancery, 270 ..... 7*
Young v. *Gnichtel*, 28 F. (2) 789 7

STATUTES:

Revenue Act of 1921, c. 136, 42 Stat. 229, 230, 232, 233
Sec. 202(a) (2) 7
Sec. 202(c) (3) 8*
Sec. 202(d) (1) 8*
Sec. 206(a) (6) 15
Revenue Act of 1924, c. 244, 43 Stat. 258, 263
Sec. 204(a) (2) 11
Sec. 204(a) (3) 11, 12
Sec. 204(a) (4) 12
Sec. 208(a) (8) 19
Revenue Act of 1926, c. 27, 44 Stat. 14, 19, 20
Sec. 204(a) (2), (3), (4) 13*
Sec. 208(a) (8) 19
Revenue Act of 1928, c. 852, 45 Stat. 811, 818, 819
Sec. 101(c) (8) 19*
Sec. 113(a) (2), (3), (4) 13*
Revenue Act of 1932, c. 209, 47 Stat. 192, 198, 199
Sec. 101(c) (8) 19*
Sec. 113(a) (2), (3), (4) 13*
Revenue Act of 1934
Sec. 113(a) (2), (3), (4) 13*
New York Personal Property Law, Sec. 15, Laws 1909, c. 45 ..... 7*

* Footnote.

MISCELLANEOUS:

	PAGE
Regulations 62, Art. 1651	20
Regulations 65, Art. 1651	20
Regulations 79, Art. 21	11*
I. T. 1379, I-2 Cum. Bull. 41	24
I. T. 1660, II-1 Cum. Bull. 36	24
I. T. 1889, III-1 Cum. Bull. 70	21, 24*
Ways & Means Committee Report, No. 350, 67th Cong., 1st Session	18
Ways & Means Committee Report, No. 179, 68th Cong., 1st Session	12, 25*
Ways & Means Committee Report, No. 1, 69th Cong., 1st Session	20*
Senate Finance Committee Report, No. 398, 68th Cong., 1st Session	12, 25*
Senate Finance Committee Report, No. 52, 69th Cong., 1st Session	20*
Hearings Before the Ways & Means Committee, 68th Cong., 1st Session, on H. R. 6715, Jan. 14-19, 1924	25*
Hearings Before the Senate Finance Committee, March 7-April 8, 1924	25*
Congressional Record, vol. 65	25*
1 Perry on Trusts, Sec. 321, 827a	7*
Webster's New International Dictionary	8*

* Footnote.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 873

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

AGAINST

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Respondent.

No. 899

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Petitioner,

AGAINST

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN No. 873 AND FOR PETITIONER IN No. 899

Opinions Below

The opinion of the Board of Tax Appeals (R., pp. 29-34) is reported in 27 B. T. A. 1127. The opinions

of the Circuit Court (R., pp. 39-42) are reported in 68 F. (2) 19.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 26, 1933. Petitions for certiorari were filed March 17, 1934 and March 26, 1934, respectively, and were granted April 9, 1934 (R., p. 45). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

In No. 899. Where a trust was created in 1921 for the benefit of the grantor's son, to which was transferred stock purchased by the grantor in 1906, and such stock was sold by the trustee in 1922, what is the basis for computing gain or loss? Specifically, does Sec. 202(a) (2) of the Revenue Act of 1921, providing that the basis of "property, acquired by gift" shall be the same as it would be in the hands of the donor, apply?

In No. 873. If the proper basis is cost to the grantor of the trust, is such profit a "capital gain" derived from property "held" for more than two years within the meaning of Sec. 206(a) (6) of the Revenue Act of 1921, and therefore taxable at the capital gain rate of 12½%, or is such profit an ordinary gain and taxable at the normal and surtax rates?

Statutes Involved

These will be found in the Appendix, *infra*, page 27, *et seq.*

Statement

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of common stock of Corn Products Refining Company at a cost of $141,375, which exceeded value on March 1, 1913 (R., f. 61).

On December 24, 1921, Matthiessen transferred the stock, irrevocably, to The New York Trust Company, in trust for his son, Erard A. Matthiessen, with remainders over in case of the death of the son. (R., ff. 61, 62. A copy of the trust indenture appears at R., pp. 6-8.)

On December 24, 1921, the stock had a fair market value of $577,500 (R., f. 62).

In 1922 the Trust Company sold the stock for $603,385 (R., f. 62).

In computing taxable profit the Commissioner used as a basis the cost of the stock to the grantor of the trust, and determined that such profit was taxable at the normal and surtax rates and was not taxable at the 12½% rate prescribed for "capital gain" (R., f. 62).

The Board of Tax Appeals sustained the Commissioner. The Circuit Court affirmed the Board as to basis but reversed the Board on the other point, holding that the profit was taxable as a capital net gain and not as ordinary income.

The decision as to capital gain conflicted with decisions of the Third Circuit and the Court of Appeals of the District of Columbia [*Johnson* v. *Commissioner*, (C. C. A. 3) 52 F. (2) 726; *Shoenberg* v. *Burnet*, (C. A. D. C.) 55 F. (2) 543], and the Commissioner petitioned for certiorari on this point (No. 873). The taxpayer, while opposing the Commissioner's petition, asked for a writ on the basis question (No. 899), if a writ should be granted the Commissioner. The Court granted both petitions and both questions are here for review.

Specification of Errors to be Urged

1. The Circuit Court erred in holding that Sec. 202 (a) (2) applied.

2. The Circuit Court erred in failing to hold that the basis for computing gain was value of the stock at the time it was transferred in trust.

Summary of Argument

As to Basis. The property sold was trust corpus; the seller, the trustee. The statute does not apply because the trustee did not acquire the trust corpus "by gift." The trust was merely an instrumentality for effecting the gifts to the life tenant and remaindermen. They are the donees. The statute would be applicable if they had sold the property given to them. Against the receipt of trust corpus the trustee gives an undertaking which de-

prives him of all benefit therefrom. The property is not a "gift" to him. For present purposes, his position is analogous to that of a bailee, an attorney-in-fact, a custodian, or a nominee, in none of which cases is the transferee a donee. The view that a trustee does not acquire "by gift" within the meaning of Sec. 202(a) (2) has been incorporated in the Revenue Act of 1924 and all subsequent Revenue Acts, and this construction by legislation should be given effect. To apply the statute would conflict with the rule that the trust is a taxpayer separate and distinct from the beneficiaries. The Board of Tax Appeals has not been consistent on this question and earlier decisions to a different effect should be followed. Sec. 202(a) (2) not being applicable, the proper basis is value at the time the stock was transferred in trust.

As to Capital Gain. The basis section and the capital gain section should be read together and the policy of the law and the object of Congress should be given effect. The purpose of the basis provision was to put the donee in the position of his donor. This theory should be applied with consistency; otherwise, the donee will be in a less favorable position than the donor and the object of the law will be defeated *pro tanto.* The purpose of the capital gain section was to induce taxable transactions otherwise prevented by the excessive tax burden resulting from applying graduated rates to a profit representing an appreciation over a period of years. Hence, it must have been the intention of Congress to measure the period by reference to the time the gain accrued. That view best

promotes the end desired. The change in the 1926 Act obviating the question was interpretative. The purpose and policy of the law leads to that conclusion. The change is stated in the interpretative form. It appears from the Committee Reports on the 1926 Act that the change was considered interpretative as to non-taxable exchanges and distributions. It approved Treasury Department Regulations in those cases. The Reports indicate and it is only reasonable to assume that the concurrent change as to gifts was made for the same purpose. The terms of the statute in fact are not clear and the word "held" must be interpreted in any case. In that event, it should be interpreted in a way consistent with the policy of the law, and not in a way which would defeat its purpose and impose an unintended burden. The adoption of the 1924 Act without change and after a short lived interpretation of this provision by the Treasury Department did not constitute legislative recognition of that interpretation. There is no indication that Congress considered the matter before the passage of the 1924 Act. The decisions cited by the Commissioner do not support his position, whereas there are many decisions of this Court which do support the taxpayer's position.

ARGUMENT

I

Section 202(a) (2) does not apply, and the basis for computing profit is value of the stock at the time it was transferred in trust.

A. The statute does not apply to a sale by the trustee of property transferred in trust.

The issue is whether the "property" sold, the "basis" of which is to be determined, was acquired by the seller "by gift." The property sold was trust corpus; the seller was the trustee. We submit the statute does not apply because the *trustee* did not acquire the *trust corpus* "by gift."

Upon the creation of a trust a number of different property rights are created, the sale of any one of which will be recognized for income tax purposes. The trustee acquires legal title to the trust corpus; the life tenant and remainderman acquire a life estate and a remainder interest. If the trustee sells trust corpus, the trust realizes gain or loss from the sale of that property (*Anderson* v. *Wilson,* 289 U. S. 20); if the life tenant sells his life estate,[1] the life tenant realizes gain or loss from the sale of that property [see *Commissioner* v. *Marshall Field,* (C. C. A. 2) 42 F. (2) 820; *Young* v. *Gnichtel,* (D. C., N. J.)

---

[1] As he can do unless forbidden by the trust instrument or by statute. *Croxall* v. *Shererd,* 5 Wall. 268, 281; *Doe* v. *Laming,* 2 Burrow, 1109; *Walton* v. *Walton,* 7 Johnson's Chancery, 270; *Merchants' Loan & Trust Co.* v. *Patterson,* 308 Ill. 519, 139 N. E. 912, 916; 1 Perry on Trusts, Sec. 321, 827a. Cf. N. Y. Personal Property Law, Sec. 15, Laws 1909, c. 45.

28 F. (2) 789; *O'Malley-Keyes* v. *Eaton,* (D. C., Conn.) 24 F. (2) 436]; similarly, if a remainderman sells his remainder interest (*Elfreth,* 15 B. T. A. 147, petition for review dismissed without opinion by C. C. A. 8, April 5, 1932).

The situation may be compared to a corporation and its stockholders. The stock represents merely the beneficial interest in the corporate assets, yet a sale of corporate assets means gain or loss to the corporation; a sale of stock means gain or loss to the stockholder. Where stock is issued for assets, the stock may have a different basis to the stockholder than the assets to the corporation, depending upon the statutory bases prescribed.[2]

The beneficiaries acquire their interests "by gift," but the trustee does not so acquire the trust corpus (*Burnet* v. *Guggenheim,* 288 U. S. 280, 286). The word "gift" connotes a transfer made to confer a gratuitous benefit on the transferee.[3] Upon the creation of a trust the things given

---

[2] Under Sec. 202(c) (3) and 202(d) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 230, when assets were transferred to a corporation in exchange for its stock the stock received took the same basis as the assets transferred. However, the corporation acquired a new basis for the assets of value of its stock issued for the property. *Unaka & City National Bank* v. *U. S.,* (C. C. A. 6) 50 F. (2) 1031, certiorari denied, 284 U. S. 645; *Mead Realty Co.,* 21 B. T. A. 1062.

[3] *Bass* v. *Hawley,* (C. C. A. 5) 62 F. (2) 721, 723; *Noel* v. *Parrott,* (C. C. A. 4) 15 F. (2) 669, 671; *Forsyth* v. *Reynolds,* 15 How. 358, 365; *Blair* v. *Rosseter,* (C. C. A. 9) 33 F. (2) 286; *Schumacher* v. *U. S.,* (Ct. Cl.) 55 F. (2) 1007, 1011; *McKenzie* v. *Harrison,* 120 N. Y. 260, 265; *Ingram* v. *Colgan,* 106 Cal. 113, 38 Pac. 315; *Kirchner* v. *Lenz,* 114 Ia. 527, 87 N. W. 497; *Martin* v. *Martin,* 202 Ill. 382, 67 N. E. 1, 3; Webster's New International Dictionary.

are a life estate and/or remainder. The two estates include every beneficial interest. The trust is merely a device, an instrumentality, for effecting these gifts. The life tenant and remainderman are the only donees.[4] The transfer to the trustee is made in consideration of his undertaking to administer the property for the benefit of another.[5] While in the ordinary sense the trustee does not pay anything for the transfer to him, the assurances which he gives offset the value of the property received. In this respect a trust is like a bailment, a power of attorney, a custodianship, and a nominee relationship. In none of such cases is the transferee a donee. While such an undertaking ordinarily runs in favor of the transferor and not, as here, in favor of third parties, this would seem irrelevant. In each case the transferee gets no beneficial interest in the property because of the undertaking which he gives against the receipt of the property. The identity of the party for whose benefit he gives that undertaking is immaterial.

---

[4] This view and this statement of the matter has been repeatedly recognized in the cases. See *Moore* v. *Tiller*, (C. C. A. 5) 61 F. (2) 478, 479; *Cazallis* v. *Ingraham*, 110 Atl. (Me.) 359, 360; *Gannon* v. *McGuire*, 47 N. Y. Supp. 870, 872; *Littig* v. *Vestry*, 61 Atl. (Md.) 635, 636.

[5] Compare the language of the trust instrument here (R., f. 12): "Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth and for and in consideration of the sum of ten dollars ($10) by each of the parties hereto to the other in hand paid, the grantor has sold, assigned, transferred, and conveyed unto the trustee and, by these presents, does sell, assign, transfer and convey unto the trustee, six thousand shares of the common stock of Corn Products Refining Company * * *."

Suppose property is transferred to trustees under a Massachusetts trust. The transferors receive trust certificates in exchange. Clearly, there is no gift to anyone. Suppose, however, that thereafter a trust certificate is voluntarily transferred without consideration. That, clearly, is a gift of the rights represented by the certificate, but not a gift of the property transferred in trust. Suppose a grantor, who is entitled to a certificate by virtue of his contribution, directs that his certificate in the first instance be issued to another, who pays nothing therefor. That also clearly is a gift of the certificate to the recipient thereof, but this likewise involves no gift of the property acquired by the trustees. It would seem this latter situation differs from this case, for present purposes, only in the fact that here there is no trust certificate. Surely such a difference is not a distinction.[6]

It is of no consequence that upon the creation of the trust the grantor made a gift of life and remainder interests to the life tenant and remainderman. They are not the taxpayers here, and the property which was given to them was not sold. The fact that a gift is involved would be relevant only if the statute read: "In the case of property acquired in connection with or as a result of a transfer by gift of other property to someone else." Such an idea is not within the meaning of the language used.

---

[6] In an action in trover for conversion of the trust certificate the measure of damage would be the reasonable value of the *chose in action*, and not the value of the parchment or paper. *Mercer* v. *Jones*, 3 Camp. N. P. 477; *Hazewell* v. *Coursen*, 13 Jones & Sp. 22; *Bavins* v. *London etc. Bank*, 1 Q. B. 270.

The statute looks to the status of the transferee of the particular property sold.

For these reasons, we submit, *Burnet* v. *Guggenheim*, 288 U. S. 280, does not support the Commissioner here. It merely held that the relinquishment of a power to revoke a revocable trust was a taxable gift. Neither the identity of the donee nor the subject matter of the gift was in issue. If a grantor creates a trust and reserves a life estate, the subject of the gift is a remainder interest, and the gift tax is computed on the basis of the value of the remainder interest, not on the basis of the value of the trust corpus.[7] The trust corpus is not given to the donee, that is, the remainderman; nor is there any "gift" of the corpus to the trustee.[8]

The view that a trustee does not acquire "by gift" has been incorporated in the Revenue Act of 1924 and in all subsequent Revenue Acts. When the 1924 Act was passed it continued without change the provisions of the 1921 Act as to gifts (Appendix, p. 28), but immediately following there was inserted this new provision:

> "(3) If the property was acquired after December 31, 1920 by a transfer in trust (other than by

---

[7] How could basis be determined by applying Sec. 202(a) (2) to this situation? The entire beneficial interest in the property sold is not acquired by anyone "by gift." Should the trustee in calculating his basis adopt some method of apportionment and, if so, on what authority?

[8] Art. 21, Regulations 79, pertaining to the gift tax imposed by the Revenue Act of 1932, requires the filing of an information return by the transferee. The form (Treasury Department Form No. 710) is headed: "Donee's or Trustee's Information Return of Gifts."

a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, * * *;"

This was followed by the provision:

"(4) If the property was acquired by gift *or* transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition." (Italics ours)[9]

The House Ways and Means Committee reported with respect to the change:[10]

"There is no provision in the existing law which corresponds to paragraph (3). This paragraph applies the same principles to transfers to a trustee as is applied in paragraph (2) to gifts."

The Senate Finance Committee likewise explained:[11]

"There is no provision in the existing law which corresponds to paragraph (3) of subdivision (a). According to this paragraph, the basis for determining gain or loss from the sale or other disposition of property acquired after December 31, 1920, by a voluntary transfer in trust, is the same as it would be in the hands of the grantor, following the principle laid down in paragraph (2) as to gifts."

In all Revenue Acts subsequent to the 1924 Act this distinction between "gifts" and "transfers in trust" has been

---

[9] 1924 Act, Sec. 204(a) (3), (4); c. 234, 43 Stat. 258. The complete sections will be found in the Appendix, pp. 28, 29.

[10] House Report No. 179, 68th Congress, 1st Session, p. 16.

[11] Senate Report No. 398, 68th Congress, 1st Session, p. 17.

carefully preserved.[12] Such legislative history and statutory arrangement evidence an intention not to apply Sec. 202 (a) (2) to trustees. We submit this intention should be given effect.

The Circuit Court, despite the Committee reports above quoted, took the view (R., f. 81) that the change in the 1924 Act was "a definition of earlier purpose." Where the effect of a provision of a revenue statute is to impose a burden, the presumption is to the contrary (*Shwab* v. *Doyle,* 258 U. S. 529; *Lewellyn* v. *Frick,* 268 U. S. 238).

The Circuit Court, finding that "the transaction as a whole could not be less" than a gift (R., f. 80), concluded that the statute applied. Such an approach ignores the identity of the property sold, ignores the separate existence of the trustee and *cestuis que trustent,* and, we submit, is inconsistent with the well established rule that a trust is to be treated for income tax purposes as a taxpayer wholly separate and distinct from the beneficiaries [*Anderson* v. *Wilson,* 289 U. S. 20; *Busch* v. *Commissioner,* (C. C. A. 5) 50 F. (2) 800; *Baltzell* v. *Mitchell,* (C. C. A. 1) 3 F. (2) 428, certiorari denied, 268 U. S. 690; *Roxburghe* v. *Burnet,* (C. A. D. C.) 58 F. (2) 693, certiorari denied, 286 U. S. 567]. The trust and *cestuis que trustent* together do not constitute a unit and for no income tax purpose are they considered such. Their separateness has been rigidly observed wherever their status has been at issue.

---

[12] 1926 Act, Sec. 204(a) (2), (3) and (4), c. 27, 44 Stat. 14; 1928 Act, Sec. 113(a) (2), (3) and (4), c. 852, 45 Stat. 818, 819; 1932 Act, Sec. 113(a) (2), (3) and (4), c. 209, 47 Stat. 198, 199; 1934 Act, Sec. 113(a) (2), (3) and (4).

The Circuit Court was influenced by its conclusion that the purpose of Sec. 202(a) (2) "demanded that such a transaction as this be included" (R., f. 80). However, an omitted taxable subject cannot be reached by invoking a general intention (*Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 606, 607; cf. *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509). Also, taxing statutes are not to be enlarged "to embrace matters, not specifically pointed out, although standing upon a close analogy" (*United States* v. *Wigglesworth*, 2 Story 369, 373, 374), and are to be construed liberally in favor of the taxpayer and most strongly against the Government (*Bowers* v. *New York and Albany Lighterage Company*, 273 U. S. 346; *Crooks* v. *Harrelson*, 282 U. S. 55; *Gould* v. *Gould*, 245 U. S. 151; *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122).

Before the Board of Tax Appeals rendered its decision in this case it decided two other cases (*Bankers Trust Company, Trustee*, 24 B. T. A. 10; *Francis Francis*, 15 B. T. A. 1332) bearing on this question. The decision in the *Bankers Trust Company* case would seem directly in conflict with the Board's decision here. The views expressed in the *Francis Francis* case also support the taxpayer's contentions here. So far as we have been able to ascertain there have been no other cases involving the issue.

B. The basis is value at the time the stock was transferred in trust.

If Section 202 (a) (2) is not applicable, there is no provision in the Revenue Act of 1921 prescribing the basis

of a trustee, unless it be the general provision [Section 202 (a)] that the basis shall be "cost." It is well established that, under such circumstances, the basis to be used is value at the time acquired by the taxpayer. *Heiner* v. *Tindle*, 276 U. S. 582; *Brewster* v. *Gage*, 280 U. S. 327 (insofar as it involved the 1918 Revenue Act); *Rice* v. *Eisner*, (C. C. A. 2) 16 F. (2) 358, certiorari denied, 273 U. S. 764; *Lucas* v. *Daniel*, (C. C. A. 5) 45 F. (2) 58; *Matthiessen* v. *United States*, 65 Ct. Cl. 484, certiorari denied, 278 U. S. 609; *Bankers Trust*, 24 B. T. A. 10; *Francis*, 15 B. T. A. 1332; *Harris*, 14 B. T. A. 1259; *Brunton*, 15 B. T. A. 727; *Hewett*, 14 B. T. A. 281.

II

If Section 202(a) (2) is applicable the gain is taxable as a capital gain under Section 206.

This question arises only if the first point is decided adversely to the taxpayer. If a new basis was established upon the creation of the trust, admittedly there commenced a new tenure for purposes of capital gain.

The statutory provision to be construed defines "capital assets" as

> "property acquired and held by the taxpayer for profit or investment for more than two years * * *." Sec. 206(a) (6)

In interpreting this provision we ask the Court to apply the principles expressed in the following quotation from

the opinion of Mr. Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, 194:

> "The general words * * *, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."

A proper construction of the capital gain provision requires consideration not only of its purpose and design, but also of the objects and policy of the basis provision. The two sections must be read together in order to give effect to the will of the Legislature and in order not to defeat its object.

In *Taft* v. *Bowers,* 278 U. S. 470, the Court analyzed the relationship between donor and donee which had been established by the basis provision, and found that "as to the property received" the donee "assumed the position of her donor" (p. 482), and Congress had required that

> "for purposes of taxation the donee should accept the position of the donor in respect of the thing received." (p. 483)

As Judge Learned Hand said, in the view of the basis section the acceptance of the gift by the donee "is regarded as a vicarious substitution of himself for the donor" (R., p. 41).

If the trustee is substituted for the grantor for purposes of basis, he should be substituted likewise for purposes of tenure. If Sec. 202(a) (2) is applicable at all, its theory should be applied with consistency. Otherwise, the donee is put in a less favorable position than the donor, and the obvious intention of Congress to put the donee in the same position as the donor in respect of the property is defeated *pro tanto*.[13] Statutes are to be so construed that one section will not defeat another (*Bernier* v. *Bernier*, 147 U. S. 242); and laws in respect of the intensely practical matter of taxation should be applied with a view to avoiding unjust and oppressive consequences (*Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 212).

In asking the court to look to Sec. 202 in interpreting Sec. 206, we believe we ask it to do no more than it did in *Burnet* v. *Guggenheim*, 288 U. S. 280, 286, where it referred to the provisions of the estate tax law as an aid in construing the gift tax law.

Turning next to Sec. 206, we find these provisions were adopted to relieve the taxpayer from excessive tax burdens

[13] For example, if the grantor in the present case had sold the stock and put the proceeds in trust, thereby arriving at the same result as that accomplished, the grantor would have paid a maximum tax with respect to the transaction of $57,751.25, that is, 12½% of the difference between cost to the grantor and selling price. By taxing the trustee on the appreciation of sixteen years at the normal and surtax rates the Commissioner is claiming a tax of $251,497.40, or over 54% of the difference between cost to the grantor and selling price.

on gains resulting from conversion in one year of capital investments which had appreciated in value over a period of years, and to remove the deterrent effect of these burdens on such conversions, the Government thereby realizing more revenue than otherwise [*Burnet* v. *Harmel,* 287 U. S. 103, 106; *Alexander* v. *King,* (C. C. A. 10) 46 F. (2) 235, 236; House Rep. No. 350, 67th Congress, 1st Session, p. 10]. In that case the purpose of the law is best promoted by measuring the two-year period by reference to the time during which the untaxed gain accrued rather than by the time when the property was in the possession of the taxpayer. Unquestionably, Congress would have specifically so provided (as it did in the 1926 and later Acts) had it considered the matter, but

> "This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer." *Burnet* v. *Guggenheim, supra,* p. 288.

Burnet v. *Harmel,* 287 U. S. 103, affords substantial support for the taxpayer's contentions. The bonus payments were the proceeds of the "sale" of oil and gas in place under Texas law, but the transaction was not considered a "sale" within the meaning of Section 206, because, among other reasons, the transaction "did not produce the kind of hardship aimed at" (p. 106), and a contrary construction "would have tended to defeat rather than further the purpose of the Act" (p. 108). While the situation was the converse of that here, the considerations to which the Court attached importance apply with equal force.

Sec. 206 was continued without material change in Sec. 208 of the Revenue Act of 1924, c. 234, 43 Stat. 263. In the Revenue Act of 1926, however, the corresponding provision [Sec. 208(a) (8)] was amplified to obviate the present question. The statute will be found in full in the Appendix, page 32.[14] We submit the amplified provisions of the 1926 Act are interpretative and not legislative.

The balance would seem definitely in favor of this view. Having in mind the purpose and policy of the law this is the logical inference (cf. *Burnet* v. *Guggenheim, supra,* in respect to the view taken of the specific provision of the 1932 Gift Tax Law). The statutory arrangement and phraseology support that conclusion. The first sentence of Sec. 208(a) (8) of the 1926 Act is practically the same as the statute in question. They are *in pari materia.* What follows the 1926 provision is in the interpretative form. Being interpretative of the general provision of the 1926 Act it should be taken as interpretative of the corresponding provision of the 1921 Act.

The history of the 1926 provision leaves no doubt as to its interpretative character. It will be noted that three types of cases are enumerated where actual possession by the taxpayer for more than two years is not necessary:

1. Where the property was exchanged for other property without a change in basis.

---

[14] The definition of "capital assets" in Section 208(a) (8) of the 1926 Act was continued without material change in the later Revenue Acts which contained the "capital gain" provisions. 1928 Act, Sec. 101(c) (8), c. 852, 45 Stat. 811; 1932 Act, Sec. 101(c) (8), c. 209, 47 Stat. 192. Cf. 1934 Act, Sec. 117(c) (2).

2. Where the property was acquired from another person without a change in basis.

3. Where the property was received upon a capital distribution without recognition of gain or loss.

Before the passage of the 1926 Act the Treasury Department had already taken the same position with respect to cases 1 and 3 [Art. 1651, Reg. 62 (1921 Act) and Reg. 65 (1924 Act)]. Apparently there was some doubt as to whether the Regulations were sound. When the question was presented to Congress it approved the interpretation of the Treasury Department and went further and said that the same applied to property acquired by gift. The statement of the Committees on the change is set forth in the margin.[15]

[15] House Rep. No. 1 and Senate Rep. No. 52, 69th Congress, 1st Session:

"Section 208 (a) (8). The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact *the question frequently arises* as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock in order to determine whether or not he has held it for two years. The amendment proposed to this section *incorporates in the law the present regulation of the Treasury* and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. *The same question arises in the case of property received by gift after December 31, 1920.* The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.". (Italics ours)

There is nothing to indicate that, as to *exchanges,* the new provisions are interpretative and, as to *gifts,* prospectively legislative. We submit that the Congressional Committee Reports show that Congress was dealing with two questions of interpretation, first, whether a non-taxable exchange tolled the two-year period, and, second, "the same question * * * in the case of property received by gift after December 31, 1920." In both cases the function of the later statute, according to the draftsmen of the law, was intended to be interpretative.[16]

The Commissioner's principal argument is that the terms of the statute are so clear they allow no room for construction. The assumption of clarity is unfounded. The word "held" suggests many conceptions. Presumably, the Commissioner does not have in mind a physical clutching. Also, it is doubted if he means dominion, since that view was rejected in I. T. 1889, III-1 Cum. Bull. 70, and the Commissioner cites the ruling here. It is believed he claims, impliedly, that "held" as used here is synonymous with "title," a conception which becomes less and less important as we go along (*Corliss* v. *Bowers,* 281

---

[16] The Commissioner tries to distinguish the effect of the subsequent legislation as to basis from the effect of the subsequent legislation as to capital gain on the ground that in the former case the later statute "merely enacted into law the administrative interpretation of the earlier statute," whereas in the latter case "the change in the statute is contrary to the administrative construction of the prior law." When it is noted that, as to capital gain, the later statute in respect to non-taxable exchanges and distributions "merely enacted into law the administrative interpretation of the earlier statute" the distinction loses whatever significance it otherwise might have.

U. S. 376; *Burnet* v. *Guggenheim, supra; Burnet* v. *Wells,* 289 U. S. 670). But by interpreting "held" as "title" the Commissioner is engaged in the very process of construction which he asks the Court to ignore.

As long as the word "held" must be interpreted in any case, we submit it should interpreted in a way consistent with the policy of the law, and not in a way which would defeat its purpose and impose an unintended burden.

We may well believe that Mr. Justice Swayne, who wrote the opinion in *United States* v. *Hartwell,* 6 Wall. 385, cited by the Commissioner, would be among the first to reject his contention. There is set forth in the margin that portion of the opinion (pp. 395, 396) from which the Commissioner has selected two short sentences.[17] Also, in *Ruggles* v. *Illinois,* 108 U. S. 526, and *Lake County* v. *Rollins,* 130 U. S. 662, cited by the Commissioner, the Court was careful to state that terms

---

[17] "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the *legislative intent. That constitutes the law.* If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. *The rule does not exclude the application of common sense to the terms made use of in the*

are to be followed literally only if the words convey a definite meaning and the result involves no absurdity nor inconsistency with other provisions. As we read the other authorities cited by the Commissioner, they do not purport to reject the principles relied upon here.

Those principles recently have been applied in a number of cases besides *Burnet* v. *Harmel, supra.*

In *Brewster* v. *Gage,* 280 U. S. 327, the question was when a residuary legatee "acquired" the property sold, as that term was used in the section prescribing basis. The Court held the legatee "acquired" the property at the time of death. Admittedly, the legatee did not then come into possession or take legal title. The Court relied upon the facts that the legislative history did not indicate a *purpose* to establish different bases for specific and general bequests, and that it was *unreasonable* to calculate gains or losses to the estate on one basis and those to the residuary legatee on another.

In *Pinellas Ice & Cold Storage Company* v. *Commissioner,* 287 U. S. 462, the statute described a non-taxable

---

act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and included various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. *The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature.*" The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; *but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.*" (Italics ours)

reorganization as including "the acquisition by one corporation of * * * substantially all the properties of another corporation." The Court found that, looking to the *purpose* of the statute, this provision did not include a sale by one corporation of all of its assets to another although, literally, the terms covered that case. See also *Cortland Specialty Co.* v. *Commissioner,* (C. C. A. 2) 60 F. (2) 937, certiorari denied, 288 U. S. 599.

In *Burnet* v. *Guggenheim, supra,* the Court placed great reliance on the unreasonableness in practical effect of a view contrary to that which it adopted, while the Second Circuit [58 F. (2) 188], which decided the present case, thought the meaning there so clear as to preclude resort to such aids to construction.

The Commissioner claims that the view adopted in I. T. 1379, I-2 Cum. Bull. 41, and I. T. 1660, II-1 Cum. Bull. 36[18] received legislative sanction by the enactment of the 1924 Act without change. The first ruling was promulgated in July, 1922, and the 1924 Act was approved June 2, 1924, c. 234, 43 Stat. 253. The interval of less than two years would scarcely seem the long period of executive construction referred to in *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, and *Brewster* v. *Gage,* 280 U. S. 327, relied upon by the Commissioner. In *Merritt* v. *Cameron,* 137 U. S. 542, 552, the Court said that a construction of a statute by the executive department charged with its execution is not binding upon the

[18] The Commissioner also cites I. T. 1889, III-1 Cum. Bull. 70, but the views expressed there would seem more favorable to the taxpayer than they are to the Commissioner.

courts "unless such construction has been continuously in force for a long time."

A careful examination of the records of the consideration of the 1924 Revenue Act before passage fails to indicate that the situation was brought to the attention of Congress. There is nothing on the subject either in the Committee Reports,[19] or in the reports of the hearings,[20] or in the Congressional Record covering the debate.[21]

The Commissioner relies upon the line of cases represented by *Darby-Lynde Co.* v. *Commissioner,* (C. C. A. 10) 51 F. (2) 32. If resort is to be had to analogies, we submit a closer one is that represented by the cases of *United States* v. *Kauffmann,* (C. C. A. 9) 52 F. (2) 1045, and *Commissioner* v. *Sansome,* (C. C. A. 2) 60 F. (2) 931, certiorari denied, 287 U. S. 667. In those cases the courts held that a non-taxable reorganization of a corporation did not change accumulated surplus into capital, and that distributions by the reorganized company constituted "dividends" within the meaning of the income tax law. In reaching this conclusion the courts construed the reorganization provisions and the dividend provisions together and decided that what was not recognized as a disposition for purposes of fixing gain or loss

---

[19] House Rep. No. 179, Senate Rep. No. 398, 68th Cong., 1st Session.

[20] Hearings Before the Ways & Means Committee, 68th Cong., 1st Session, on H. R. 6715, January 14-19, 1924. Hearings Before the Senate Finance Committee, March 7–April 8, 1924.

[21] Congressional Record, vol. 65, February 14-16, 18-23, 25, 28, 29, 1924 (House); April 24, 25, 28-30, May 1-3, 5-10, 1924 (Senate).

should not be recognized as changing accumulated profits into capital. The decisions upheld the Commissioner.

For these reasons, if the first point is decided against the taxpayer, the capital gain section should be construed in its favor. Otherwise, the purpose of the law will be defeated and the result, contrary to the intention of Congress, will be extremely harsh. The terms of the statute do not preclude the Court from giving effect to its object and policy.

Conclusion

The decision of the Circuit Court of Appeals on the first issue should be reversed, but if affirmed, its decision on the second issue should likewise be affirmed.

Respectfully submitted,

J. DuPratt White,
Counsel for Respondent in No. 873,
for Petitioner in No. 899.

Russell D. Morrill,
Chauncey Newlin,
Of Counsel.

May 1934.

APPENDIX

Containing Statutes Involved

As to Basis

Revenue Act of 1921; c. 136, 42 Stat. 229.

Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

(1) In the case of such property, which should be included in the inventory, the basis shall be the last inventory value thereof;

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

Revenue Act of 1924; c. 244, 43 Stat. 258.

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

(1) If the property should have been included in the last inventory, the basis shall be the last inventory value thereof;

(2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made. The provisions of this paragraph shall not apply to the acquisition of such property interests as are specified in subdivision (c) or

(e) of section 402 of the Revenue Act of 1921 or in subdivision (c), (d), or (f) of section 302 of this Act;

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

AS TO CAPITAL GAIN

Revenue Act of 1921; c. 136, 42 Stat. 232, 233.

Sec. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets consummated after December 31, 1921;

(3) The term "capital deductions" means such deductions as are allowed under this title for the purpose of computing net income and are properly allocable to or chargeable against items of capital gain as defined in this section.

(4) The term "capital net gain" means the excess of the total amount of capital gain over the sum of capital deductions and capital losses;

(5) The term "ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions; and

(6) The term "capital assets" as used in this section means property acquired and held by the tax-

payer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the

partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

Revenue Act of 1926; c. 27, 44 Stat. 19, 20.

Sec. 208. (a) For the purposes of this title—

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets;

(3) The term "capital deductions" means such deductions as are allowed by section 214 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year;

(4) The term "ordinary deductions" means the deductions allowed by section 214 other than capital losses and capital deductions;

(5) The term "capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gain;

(6) The term "capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain;

(7) The term "ordinary net income" means the net income, computed in accordance with the provi-

sions of this title, after excluding all items of capital gain, capital loss, and capital deductions; and

(8) The term "capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 204 the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged. In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of subdivision (c) of section 203 of this Act or of the Revenue Act of 1924, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(b) in the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain.

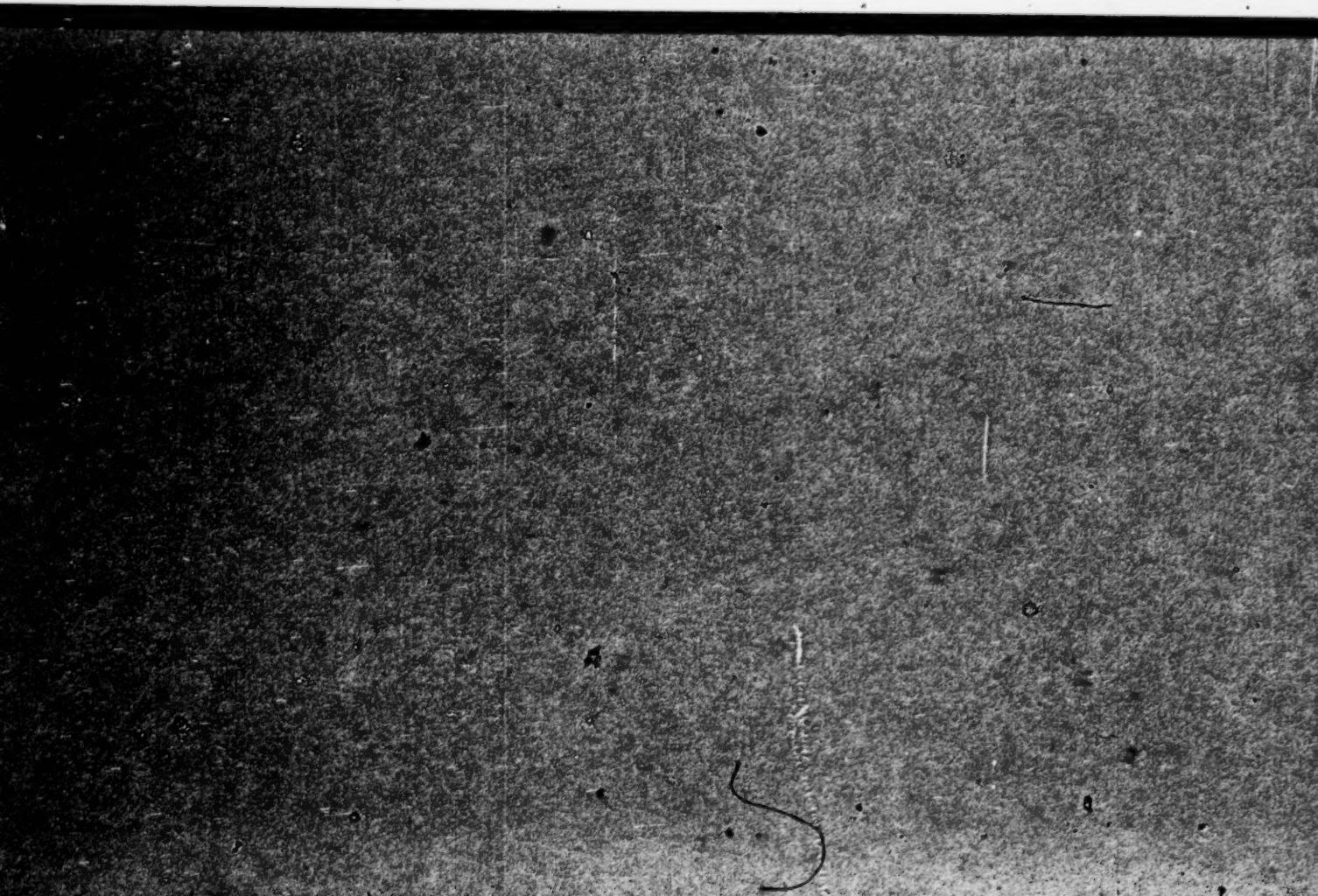
(c) In the case of any taxpayer (other than a corporation) who for any taxable year sustains a capital net loss, there shall be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax under this subdivision be less than the taxes imposed by sections 210 and 211 computed without regard to the provisions of this section.

(d) The total tax determined under subdivision (b) or (c) shall be collected and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

(e) In the case of the members of a partnership, of an estate or trust, or of the beneficiary of an estate or trust, the proper part of each share of the

net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) or (c) of this section.



SUPREME COURT OF THE UNITED STATES.

Nos. 873, 899.—October Term, 1933.

873 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* New York Trust Company, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company.

899 New York Trust Company, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 28, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

This controversy arises out of the calculation of an income tax on the gain realized on the sale of property by a trustee in 1922. April 27, 1906, one Matthiessen acquired 6,000 shares of stock at a cost of $141,375. Its value on March 1, 1913, was less than cost. December 4, 1921, desiring to make provision for his son, Erard, he transferred the stock to the New York Trust Company in trust for him with remainder over in case of his death. When the trust was created the market value of the stock was $577,500. The trustee sold it in 1922 for $603,385. In the tax return for that year the trustee included $87,385 as the gain resulting from the sale. That figure was reached by subtracting the cost of the shares

to the trustor, then claimed to be $516,000, from the amount the trustee received for them. But the trustee then, as it always has, insisted that the gain should be calculated on the basis of the value at the time of the creation of the trust. And it applied the rate of 12½ per cent., applicable to capital gains. The Commissioner ascertained gain on the principle adopted in the return but found the cost to trustor to be $141,375. He applied the normal and surtax rates that ordinarily are laid upon the incomes of individuals and by the use of these factors arrived at an additional assessment of $238,275.95.[1] The Board of Tax Appeals sustained the determination. 27 B. T. A. 1127. The lower court held that the gain had been correctly ascertained, but that it was taxable at 12½ per cent. 68 F. (2d) 19. These writs were granted on petition of the Commissioner and cross-petition of the trustee. — U. S. —.

The questions are: (1) Whether the gain resulting from the trustee's sale is the difference between price paid by trustor and that received by trustee, and (2) if so, whether the 12½ per cent. rate is applicable.

The Revenue Act of 1921, 42 Stat. 227, governs. Section 2 (9) defines taxpayer to include any person, trust or estate subject to a tax imposed by the Act. Section 202 (a) provides: "That the basis for ascertaining the gain derived . . . from a sale . . . of property . . . shall be the cost of such property; except that . . . (2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor". Section 206 (a) (6) defines capital assets to be "property acquired and held by the taxpayer for profit or investment for more than two years" and (b) provides that the net gain from the sale of capital assets may be taxed at the rate of 12½ per cent. instead of at the ordinary rates. Section 219 (a) declares that the normal and surtax on net incomes of individuals, shall apply to the income of property held in trust, including (3) income held for future distribution; (b) the fiduciary is required to make the return of income for the trust. And subsection (c) provides that in cases under (a) (3) the tax shall be imposed upon the net income of the trust and shall be paid by the fiduciary.

[1] On the basis of the return made the tax was $14,391.71. On the construction of § 202 (a) (2) for which trustee contends the tax would be $7,714.00.

By the trust indenture, which recites mutual covenants and agreements and the payment of $10 by each to the other as the consideration, the trustor did "sell, assign, transfer, and convey" the 6,000 shares "in trust, nevertheless, for the benefit of" his son, Erard, "to be administered by the trustee" under specified terms and conditions among which are these: The trustee was required to hold the shares and any property purchased out of the avails, to collect and retain income until the twenty-first birthday of Erard, then to pay him the accumulated income, thereafter to pay him current income until he attained the age of twenty-five years, and at that time to deliver to him the principal and undistributed income. During the life of the trustor, the trustee was not to sell or reinvest without the written consent and approval of the trustor. In case of Erard's death before the age of twenty-five, the entire estate was to go to other sons of the trustor.

The trustor irrevocably disposed of the shares. He did not sell but made a gift. *Burnet* v. *Guggenheim*, 288 U. S. 280. He gave the trustee legal title temporarily to be held to enable it to conserve, administer and transfer the property for the use and benefit of his son to whom he gave the beneficial interest. It may rightly be said that the trustee and beneficiary "acquired by gift" as meant by § 202 (a).[2] If the broad definition in § 2 (9) stood alone, either might be regarded as the taxpayer but it is qualified by the rule that the trustee must pay the tax. It follows that the trustee properly may be regarded as the taxpayer and, for the purpose of calculating the gain, as having assumed the place of the trustor. Section 202 (a) (2) was enacted to prevent evasion of taxes on capital gains. *Taft* v. *Bowers*, 278 U. S. 470, 479, 482. And see *Cooper* v. *United States*, 280 U. S. 409. Transfers to trustees for the benefit of others are clearly within the reason for the enactment. They may be used to avoid burdens intended to be imposed, quite as effectively as may gifts that are directly made. The difference between the cost to the trustor in 1906 and the amount for which the trustee sold in 1922 was rightly taken as taxable income of the trust.

---

[2]Executors of McDonogh *v.* Murdoch, 15 How. 367, 400, 404. Maguire *v.* Trefry, 253 U. S. 12, 16. Neilson *v.* Lagow, 12 How. 98, 106-107, 110. Croxall *v.* Shererd, 5 Wall. 268, 281. Doe, Lessee of Poor *v.* Considine, 6 Wall. 458, 471. Bowen *v.* Chase, 94 U. S. 812, 817, 818-819. Young *v.* Bradley, 101 U. S. 782, 787. Anderson *v.* Wilson, 289 U. S. 20, 24-25.

We come to the question whether the gain derived from the trustee's sale is taxable at 12½ per cent. That rate is not applicable unless the shares were "capital assets" defined by § 206 (a) (6) to be "property acquired and held by the taxpayer for profit or investment for more than two years". The time between the creation of the trust and the sale was less than the specified period and, if the words alone are to be looked to, the shares were not by the taxpayer "held . . . for more than two years". Soon after the passage of the Act the Income Tax Unit of the Bureau of Internal Revenue ruled that property transferred to a trustee, for purposes and upon terms and conditions analogous to those expressed in the indenture before us, which remained in his hands less than two years was not "capital assets" and that the resulting gain was not taxable at the 12½ per cent. rate. That construction was followed by the Board of Tax Appeals, the Circuit Court of Appeals for the Third Circuit and the Court of Appeals of the District of Columbia.[3] The Commissioner says that the words of the definition are free from ambiguity and that the statute contains no exception. From an opinion of this court he invokes these statements: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe". *United States* v. *Hartwell*, 6 Wall. 385, 396. He suggests that his construction was approved by the Revenue Act of 1924, § 208 (a) (8), 43 Stat. 263, which retained the definition, and that the provision in the Revenue Act of 1926, § 208 (a) (8), 44 Stat. 19, which conforms to the construction for which the trustee here contends, operated to make a change in the law.

The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commr. of Immigration* v. *Gottlieb*, 265 U. S. 310, 313. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 37. But the expounding of a

[3] I. T. 1379, I-2 C. B. (July-December, 1922) 41. I. T. 1560, II-1 C. B. (January-June, 1923) 36. I. T. 1889, III-1 C. B. (January-June, 1924) 70. McKinney v. Commissioner (1929) 16 B. T. A. 804, 808. Johnson v. Commissioner (1929) 17 B. T. A. 611, 614; affirmed (C. C. A. 3, 1931) 52 F. (2d) 727. Shoenberg v. Commissioner (1930) 19 B. T. A. 399, 400; affirmed (Ct. App. D. C., 1931) 55 F. (2d) 543. Stegall v. Commissioner, (1931) 24 B. T. A. 1231, 1235. McCrory, Trustee v. Commissioner (1932) 25 B. T. A. 994, 1011.

statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this court said (p. 194): "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." Quite recently in *Ozawa* v. *United States,* 260 U. S. 178, we said (p. 194): "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." And in *Barrett* v. *Van Pelt,* 268 U. S. 85, 90, we applied the rule laid down in *The People* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers".

The part of the definition under consideration is this: "held . . . for more than two years". Although on superficial inspection the words appear to be entirely clear, the Treasury Department deemed construction necessary to disclose the meaning that, upon consideration of the actual transactions of the taxpayers, it found Congress to have intended. Regulations 62, Art. 1651, declares: "The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property . . . the prescribed period applies to the property exchanged and the property re-

ceived in exchange considered as a unit". Construed strictly according to the letter, the provision would not include shares received as a dividend less than two years before the sale or property taken in exchange within that period. The need of this regulation illustrates how ambiguities requiring construction often exist where upon first reading the words seem clear. Generally, questions as to the meaning intended do not arise until the language used is compared with the facts or transactions in respect of which the intent and purpose are to be ascertained. *Bradley* v. *The Washington, Alexandria, and Georgetown Steam Packet Company*, 13 Pet. 89, 97. *Deery* v. *Cray*, 10 Wall. 263, 270. *Patch* v. *White*, 117 U. S. 210, 217. *Gilmer* v. *Stone*, 120 U. S. 586, 590. *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474.

Legislative reasons for applying the lower rate to capital gains give support to the construction for which the trustee contends. The report of the Committee on Ways and Means states: "The sale of . . . capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increase of the tax revenue, have been blocked by this feature of the present law. In order to permit such transactions to go forward without fear of a prohibitive tax, the proposed bill, in section 206, adds a new section . . . to the income tax, providing that where the net gain derived from the sale or other disposition of capital assets would, under the ordinary procedure, be subjected to an income tax in excess of 15 per cent. [afterwards changed to 12½ per cent.] the tax upon capital net gain shall be limited to that rate. It is believed that the passage of this provision would materially increase the revenue, not only because it would stimulate profit-taking transactions but because the limitation of 15 per cent. is also applied to capital losses. Under present conditions there are likely to be more losses than gains." 67th Congress, 1st Session, House Report No. 350, p. 10. See also Senate Report No. 275, p. 12. In respect of the legislative purpose to lessen hindrance caused by high normal and surtaxes, there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period.

Here the taxable gain was ascertained by putting together the periods in which the shares were held by trustor and trustee respectively. The taxable gain was the same as if the former held continuously from the time of purchase in 1906 until the sale in 1922. But to ascertain the applicable rate the Commissioner broke the continuity. If the trustor had held until the sale, the 12½ per cent. rate would have been applicable and the tax would have been substantially less than one-fourth of the amount assessed against the trustee who, for the purpose of calculating the gain, was substituted for the trustor.[4]

Sections 202 (a) (2) and 206 (a) (6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and are not to be regarded as wholly unrelated. While undoubtedly legally possible and within the power of Congress, the methods adopted and results attained by the Commissioner are so lacking in harmony as to suggest that the continuity required to be used to get the base was also intended for use in finding the rate. No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort.

The Commissioner's suggestion that, by retaining the same definition in the 1924 Act, Congress approved the construction for which he contends is without merit. The definition had not been construed in any Treasury Decision, by the Board of Tax Appeals or by any court prior to that enactment. The dates of all constructions of the definition to which our attention has been called are shown in the margin.[5] The Regulation above referred to was approved February 15, 1922. In respect of the question here involved, it puts no construction upon the definition. The rulings, I. T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they "have none of the

[4]The deficiency assessed, $238,275.91, plus original assessment, $14,391.71, makes the total $252,667.66. The taxpayer's calculation indicates that if the 12½ per cent. rate were applied the total tax would be $58,921.51.

[5]See Note 3.

force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law." See cautionary notice published in the bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it.

The Revenue Act of 1926, § 208 (a) (8)[6] contains substantially the same language as that used in the 1921 Act to define capital assets. That part of the subdivision is followed by rules for determining the period for which the taxpayer has held the property. Among them is one applicable to facts such as these presented in the case before us. It is substantially the same as the construction for which the trustee contends. Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law. In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926 and the legislative purpose underlying it, the contention that the new words were added to change the meaning of "capital assets" as defined in the earlier Acts is without force. The definition so clarified was not new law but "a more explicit expression of the purpose of the prior law." *Jordan* v. *Roche*, 228 U. S. 436, 445. *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837, 842. *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[6] "The term 'capital assets' means property held by the taxpayer for more than two years. . . . In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 [corresponding to § 202 (a) (2) of the 1921 Act] such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person". 44 Stat. 19.

SUPREME COURT OF THE UNITED STATES.

Nos. 873, 899.—October Term, 1933.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. New York Trust Company, Trustee. (873)	On Writs of Certiorari to the Circuit Court of Appeals for the Second Circuit.
New York Trust Company, Trustee, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. (899)	

[May 28, 1934.]

Mr. Justice Roberts.

Within the meaning of Section 202 (a) of the Revenue Act of 1921 the trustee acquired the trust *res* by gift. But reference must be had to Sections 206 and 219 to ascertain the rate of tax to be applied to the gains on the sale. These are distinct sections, found not in juxtaposition with 202, but in portions of the Act dealing with unrelated topics; the one with "Capital Gains" and the other with "Estates and Trusts". Confessedly the first grants an exemption from the normal rate of tax and allows payment at a lower rate only to a "taxpayer" who realizes gain from the sale of a capital asset which he (the "taxpayer") has held for profit or investment for over two years. The second, in words too plain to be misunderstood, designates the trustee of a trust such as the one here in question as the taxpayer. The unambiguous mandate of the Act should be enforced.

1. Under the recognized rules of construction we should give the words of the statute their ordinary and common meaning. *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560. If the language be plain there is nothing to construe. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419; *Thompson* v. *United States*, 246 U. S. 547, 551. We cannot enact a law under the pretense of construing one. *Heiner* v. *Donnan*, 285 U. S. 312, 331.

Nor can we avoid the plain meaning of a statute by construction, so-called, because we think as written it begets "hard and objectionable or absurd consequences, which probably were not within

the contemplation" of its framers. *Crooks* v. *Harrelson*, 282 U. S. 55. Where, as in the present case, the provision is one granting an exemption from the full rate of taxation, doubts must be resolved against the taxpayer. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235.

2. For twelve years after the passage of the Act the administrative rulings uniformly denied the benefit of the capital gains sections of the Act of 1921 to a donee who had not himself held the property over two years. These are entitled to respectful consideration and will not be disregarded except for weighty reasons. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378. Two Courts of Appeals have decided against the trustee's contention. In the face of this unbroken agreement of the executive and judicial departments, we should be slow to announce a contrary view.

3. The reason assigned for ignoring the plain import of the terms used in Sections 206 and 219 is that the provisons, read in their ordinary sense, bring about a result thought to be contradictory of the paramount purpose to permit the payment of tax on capital gains at a reduced rate. The suggestion is that Congress inadvertently omitted a provision whereby the tacking of the tenures of donor and donee would be allowed for finding the rate, since it has required such tacking for ascertaining the base. It is said that it would be absured to attribute any other intent to the framers of the law. But there is no necessary inconsistency in the two provisions, literally applied. Plainly the requirement that a donee should calculate his gain on the value paid by his donor was to prevent evasions, through transfer and immediate sale by the donee, who would claim the value at the date of the gift as the base and assert that he had made no gain. There is no incongruity in declaring that in the case of a gift the donee shall pay tax at the full rate unless he shall have held the property a full two years. Congress might well think it proper thus to condition the privilege of a reduced rate to one who paid nothing for the property.

Assuming however, for the sake of argument, that there is a logical inconsistency between the prescribed method for arriving at the base and that for ascertaining the rate, it is the province of Congress alone to remove it. There is no abstract justice in any system of taxation. Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed

general policy. Such a principle of decision would embark us on a sea of construction whose bounds it is difficult to envisage. Every revenue act embodies policies which conflict to some extent with those elsewhere in the Act evinced. Income tax legislation is a continuous series of corrections and amendments in an effort to make the policy of taxation more congruous.

The very sections extending the relief of a reduced rate on capital gains, teach us how inconsistently the principle has been followed and how impossible and improper it would be for a court to rewrite the sections in an effort to make them logically consistent.

The Act omitted to impose any limitation of 12½ per cent on capital net losses. If, therefore, a taxpayer had no capital gains during the year, he could deduct his entire capital losses from his ordinary income.[1] This omission was cured by the Revenue Act of 1926, which reduced the permissible deduction from the tax on net income to 12½ per cent of capital net loss.[2] The amendment of 1926, in turn, leaves a glaring inconsistency, for though the taxpayer may have no actual income, yet as a result of the application of the mandatory 12½ per cent rate to capital net losses, he may have to pay a tax.[3]

Under the Act of 1921 capital assets were so defined as to exclude property held for personal use or consumption of the taxpayer or his family.[4] By the Revenue Act of 1924 and later Acts the exception was omitted.[5] It results that whereas the taxpayer may now include such property as the residence occupied by him, his automobiles, his jewels, and similar items, in respect to gains, he may not include them with respect to losses, for no deduction whatever for losses is permitted in the case of property held for personal use or consumption.[6]

---

[1]Sec. 202 (a) (2); Sec. 206 (a) (2); Sec. 206 (b); 42 Stat. 229; 232-3.

[2]Sec. 208 (c), 44 Stat. 20.

[3]See Sec. 208 (c), 44 Stat. 20. As stated in Regulations 69, Art. 1654, by 208 (b), if the taxpayer has a capital net gain he has an election whether to return it under the capital gains and losses provision; but the limitation with respect to a capital net loss provided in 208 (c) will be applied irrespective of the taxpayer's election.

[4]Sec. 206 (a) (6), 42 Stat. 233.

[5]Sec. 208 (a) (8), 43 Stat. 263; Act of 1926, Sec. 208(a) (8), 44 Stat. 19; Act of 1928, Sec. 101 (a) (8), 45 Stat. 811.

[6]Revenue Act of 1926, Sec. 208 (a) (2), 44 Stat. 19; Regulations 69, Art. 1651; Art. 141; Cumulative Bulletin V-I, 61.

Instances might be multiplied of logical inconsistency in the incidence of the capital gain or loss provisions; but this court is not at liberty, because it thinks the provisions inconsistent or illogical, to rewrite them in order to bring them into harmony with its views as to the underlying purpose of Congress.

4. The sections in question were reenacted without change in the Revenue Act of 1924. If, as is suggested, omission of a provision permitting one circumstanced as this trustee to have the benefit of the reduced rate in virtue of his donor's as well as his own tenure was an inadvertence as respects the Act of 1921, it is curious that the same inadvertence occurred in the enactment of the 1924 Act, despite the fact that the rulings of the department had been against the trustee's present contention. The section was amended by the Act of 1926 so as to allow the donee to tack his donor's tenure to make up the required two years.[7] In reporting it the committees of the Senate and House both referred to this as an amendment of the law. The change was recommended in connection with two other alterations of language, both intended to confirm rulings of the department. In referring to this particular alteration the committees said:

"The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section."[8]

Certainly this language is far from compelling the conclusion pressed upon us, that the amendment was merely a confirmation of the understanding of Congress as to the effect of the earlier Acts.

The judgment should be reversed and the cause remanded for the calculation of the tax to the trustee at ordinary rates for the reason that it did not hold the capital assets for two years, so as to entitle it to the 12½ per cent rate.

Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.

---

[7]Sec. 208 (a) (8), 44 Stat. 19.

[8]House Rep. No. 1 and Senate Rep. No. 52, 69th Cong., 1st Session.